(13)

No. 00-1531-CFX Title: Verizon Maryland Inc., Petitioner
v.
Public Service Commission of Maryland, et al.

Docketed: April 5, 2001 Court: United States Court of Appeals for the Fourth Circuit

Vide:
00-1711

Entry	Date	Proceedings and Orders
	Apr 5 2001	Petition for writ of certiorari filed. (Response due May 5, 2001)
	Apr 19 2001	Waiver of right of respondent Maryland Office of People's Counsel to respond filed.
	Apr 19 2001	Waiver of right of respondent American Communications Services of Maryland, Inc. to respond filed.
	Apr 23 2001	Waiver of right of respondents MCI WorldCom, Inc. and MCImetro Access Transmission Services to respond filed.
	Apr 27 2001	Brief of respondent Public Service Commission of Maryland in opposition filed.
	May 2 2001	Waiver of right of respondent TCG of Maryland, Inc. to respond filed.
	May 21 2001	Motion of petitioner to expedite consideration of the petition for a writ of certiorari filed.
	May 21 2001	Reply brief of petitioner Verizon Maryland Inc. filed.
	May 22 2001	DISTRIBUTED for Conference of June 7, 2001
	Jun 18 2001	REDISTRIBUTED for Conference of June 21, 2001
	Jun 25 2001	Petition GRANTED. limited to Question 2 presented by the petition. The case is consolidated with No. 00-1711, United States v. Public Service Comm'n of MD, and a total of one hour is allotted for oral argument. The cases are set for oral argument in tandem with No. 00-878, Mathias v. Worldcom Technologies. Justice O'Connor OUT. SET FOR ARGUMENT December 5, 2001. **********
	Jul 18 2001	Order extending time to file the joint appendix and petitioners' briefs on the merits to and including September 10, 2001. Order extending time to file respondents' briefs on the merits to and including October 26, 2001.
	Aug 10 2001	Letter received from counsel for respondent American Communications Services of Maryland, Inc., waiving their right to file a brief on the merits.
	Aug 27 2001	Motion of petitioner Verizon Maryland Inc., to dispense with printing the joint appendix filed.
	Sep 10 2001	Brief of petitioner Verizon Maryland Inc. filed. VIDED.
	Sep 10 2001	Brief of respondents MCI WorldCom, Inc. and MCImetro Access Transmission Services in support of petition filed.
	Sep 10 2001	Brief of respondent United States filed. VIDED.
	Sep 24 2001	Motion of petitioner Verizon for leave to dispense with printing the joint appendix DISTRIBUTED.
	Sep 26 2001	CIRCULATED.

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Entry	Date	Proceedings and Orders
	Oct 1 2001	Motion of petitioner Verizon Maryland Inc., to dispense with printing the joint appendix GRANTED. Justice O'Connor OUT.
	Oct 5 2001	Record filed.
	Oct 10 2001	Record filed.
	Oct 25 2001	Brief amicus curiae of Virginia State Corporation Commission filed. VIDED.
	Oct 26 2001	Brief of respondent Public Service Commission of Maryland filed. VIDED.
	Oct 26 2001	Brief amicus curiae of State of Illinois filed. VIDED.
	Nov 9 2001	Motion of the Solicitor General for divided argument filed.
	Nov 21 2001	Motion of the Solicitor General for divided argument GRANTED. Justice O'Connor OUT.
	Nov 26 2001	Reply brief of petitioner MCI Worldcom, Inc, et al. filed. VIDED.
	Nov 26 2001	Reply brief of United States filed. VIDED.
	Nov 26 2001	Reply brief of petitioner Verizon Maryland Inc. filed. VIDED.
	Dec 5 2001	ARGUED.
	Dec 12 2001	The petition for certiorari in this case presented the same questions at issue in Mathias v. WorldCom Technologies, 00-878, plus the additional question of subject matter jurisdiction under 28 U.S.C. Section 1331. We granted certiorari only on the additional question, and held the other questions pending their resolution in Mathias, supra. Oral argument has revealed, however, that we may be unable to reach the merits of the questions presented in Mathias. Therefore, to ensure that we have jurisdiction over all of the questions at issue in this case, we grant the writ of certiorari to the United States Court of Appeals for the Fourth Circuit on the remaining questions presented by the petition for a writ of certiorari, and request that the parties brief those questions. The briefs of petitioners are to filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, January 11, 2002. Respondent's brief is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Firday February 1, 2002. Reply briefs, if any, are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday February 15, 2002. Petitioners' opening briefs and respondent's brief shall not exceed 25 pages. Petitioners' reply briefs, if any shall not exceed 15 pages. Rules 29.2 is suspended in this case. Justice O'Connor took no part in the consideration or decision of this order.
	Dec 18 2001	Motion of respondents TCG Maryland, Inc. to treat the brief of AT&T Communications of Illinois, et al. in Mathias(00-878),as brief of respondent filed.
	Dec 28 2001	Motion of Illinois to have briefs in companion case,

Entry	Date	Proceedings and Orders
		Mathias v. WorldCom Technologies, Inc., No. 00-878, considered as briefs amicus curiae in these cases filed.

(1) Supreme Court, U.S.
FILED

No. 001531 APR - 5 2001

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

VERIZON MARYLAND INC.,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state public utility commission's action interpreting or enforcing an interconnection agreement under the Telecommunications Act of 1996 is a "determination under [47 U.S.C. § 252]" and therefore reviewable in federal district court under 47 U.S.C. § 252(e)(6).

2. Whether, if 47 U.S.C. § 252(e)(6) does not apply, a federal district court has independent subject matter jurisdiction under 28 U.S.C. § 1331 to determine whether a state public utility commission's action interpreting or enforcing an interconnection agreement violates the Telecommunications Act of 1996.

3. Whether a state public utility commission waives its Eleventh Amendment immunity to federal district court review when it voluntarily exercises federal regulatory authority under 47 U.S.C. § 252.

4. Whether the *Ex parte Young* doctrine permits an action against the members of a state public utility commission in their official capacity to enjoin ongoing violations of federal law in their performance of federal regulatory functions.

LIST OF PARTIES TO THE PROCEEDING BELOW

The parties in the court of appeals were as follows:

American Communications Services of Maryland, Inc.

Bell Atlantic-Maryland, Inc. (now Verizon Maryland Inc.)

Susanne Brogan, in her official capacity as Commissioner of the Public Service Commission of Maryland

E. Mason Hendrickson, in his official capacity as Commissioner of the Public Service Commission of Maryland

Glenn F. Ivey, in his official capacity as Chairman of the Public Service Commission of Maryland

Claude M. Ligon, in his official capacity as Commissioner of the Public Service Commission of Maryland

MCI WorldCom, Inc.

MCImetro Access Transmission Services, Inc.

Maryland Office of People's Counsel

Public Service Commission of Maryland

RCN Telecom Services of Maryland, Inc.

Catherine I. Riley, in her official capacity as Commissioner of the Public Service Commission of Maryland

Starpower Communications, LLC

TCG-Maryland

United States of America

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Verizon Maryland Inc. states the following:

Verizon Maryland Inc. (formerly Bell Atlantic-Maryland, Inc.) is a wholly owned subsidiary of Verizon Communications Inc., a publicly held company. No publicly held company owns 10% or more of the stock of Verizon Communications Inc.

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IN THE

Supreme Court of the United States

No.

VERIZON MARYLAND INC.,
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PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-72a) is reported at 240 F.3d 279. The opinion of the district court (Pet. App. 73a-90a) is not reported The order of the Maryland Public Service Commission (Pet. App. 91a-111a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution, the relevant provisions of the Telecommunications Act of 1996 and the Federal Communications Commission's implementing regulations, and 28 U.S.C. § 1331 are set forth at Pet. App. 112a-134a.

STATEMENT OF THE CASE

The Fourth Circuit in this case decided four separate questions in a manner that squarely conflicts with the decisions of every other circuit to have decided those questions. The court of appeals held, in the following order:

(1) A state public utility commission that elects to exercise federal regulatory authority under 47 U.S.C. § 252 does not thereby waive its Eleventh Amendment immunity to federal court review. Pet. App. 14a-21a.

(2) The *Ex parte Young* doctrine does not permit an action against the members of a state public utility commission in their official capacity to enjoin ongoing violations of federal law in their performance of federal regulatory functions under 47 U.S.C. § 252. Pet. App. 21a-30a.

(3) A state public utility commission's actions interpreting or enforcing an interconnection agreement under the Telecommunications Act of 1996 is not a "determination" under 47 U.S.C. § 252 and therefore is not reviewable in federal court under § 252(e)(6). Pet. App. 30a-47a.

(4) Where 47 U.S.C. § 252(e)(6) does not itself provide subject matter jurisdiction, a federal district court lacks independent subject matter jurisdiction under 28 U.S.C. § 1331 to review a state commission's actions that allegedly violate the Telecommunications Act of 1996. Pet. App. 47a-50a.

The first three of those holdings — on waiver, *Ex parte Young*, and the scope of § 252(e)(6) — raise questions substantially identical to those on which this Court granted certiorari in *Mathias v. WorldCom Techs., Inc.*, No. 00-878 (Mar. 5, 2001). At a minimum, therefore, this petition should be held pending the Court's decision in *Mathias*.

But this case also presents a fourth question — not at issue in *Mathias* — that independently and urgently warrants this Court's review. In holding that 28 U.S.C. § 1331 gives a federal district court no independent subject matter jurisdiction to review a state commission's actions that violate the Telecommunications Act of 1996, the Fourth Circuit opened a direct and acknowledged conflict with the Sixth Circuit's contrary holding in *GTE North, Inc. v. Strand*, 209 F.3d 909 (6th Cir.), *cert. denied*, 121 S. Ct. 380 (2000). This Court should review the Fourth Circuit's ruling on that question not only because it creates a clear circuit split, but also because the resulting jurisdictional uncertainty jeopardizes the uniform and coherent administration of the 1996 Act.

If this Court were to rule in *Mathias* that a state commission's interpretation or enforcement of an interconnection agreement is not a "determination" reviewable under § 252(e)(6), the next question, logically antecedent to the Eleventh Amendment questions, would be whether a district court may nonetheless exercise federal-question jurisdiction under § 1331. But because that question is not presented by *Mathias*, the Court would have to postpone its consideration of that issue, presumably together with the Eleventh Amendment issues, to another case. By granting this petition now — at least as to questions 2, 3, and 4 — the Court would put itself in a position to

resolve the § 1331 issue concurrently with its resolution of the § 252(e)(6) issue. Then, if the Court determines that § 252(e)(6) does not apply to interpretation or enforcement decisions but that § 1331 provides an independent source of subject matter jurisdiction, it will be able to reach the Eleventh Amendment issues on which the circuits are divided.

The alternative — holding this case pending a decision on the § 252(e)(6) issue and granting certiorari only then — would significantly delay a final determination of jurisdictional and constitutional questions crucial to the integrity of the 1996 Act's scheme for increasing competition in local telecommunications markets. For that entire period, parties aggrieved by a state commission's decision interpreting or enforcing an interconnection agreement would be deprived — at least in states within the Fourth Circuit's territory[1] — of a federal judicial forum for review of the federal issues raised by such a decision. Delay so prolonged, in the context of a statute suffused with commands for urgent action,[2] would itself negate important congressional objectives.

We therefore urge the Court to grant this petition and set the case for argument in tandem with *Mathias*.

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[1] The Fourth Circuit's jurisdiction extends to Maryland, North Carolina, South Carolina, Virginia, and West Virginia. 28 U.S.C. § 41.

[2] For example, the 1996 Act prescribes tight deadlines for each stage of the negotiation, arbitration, and approval process leading up to an interconnection agreement. *See* 47 U.S.C. § 252(a)(1), (b)(1), (b)(3), (b)(4)(C), (e)(4).

1. The Role of State Commissions Under the 1996 Act

In the 1996 Act, Congress imposed a set of substantive duties on all local exchange carriers, 47 U.S.C. § 251(b), and an additional set of duties on *incumbent* local exchange carriers, *id.* § 251(c),[3] designed to accelerate the development of competition in local telephone markets. Among other things, the Act requires incumbent carriers and new entrants to negotiate the terms of agreements to fulfill the duties imposed by § 251(b) and (c). *Id.* § 251(c)(1).

Though Congress could have reserved to the federal government all regulatory authority over the Act's requirements, it chose instead to give state public utility commissions an opportunity to exercise a portion of that federal authority by voluntarily electing to administer the 1996 Act's scheme for inter-carrier agreements. If the parties to a compulsory negotiation reach agreement on mutually acceptable terms, the resulting agreement (subject to state commission approval) is "binding" as a matter of federal law. *Id.* § 252(a)(1). On the other hand, if the parties are unable to agree, either party may petition the state commission under § 252(b) to arbitrate any "open issues." In that case, it is for the state commission to resolve those issues and "impos[e] conditions" in accordance with "the requirements of section 251 . . . , including the regulations prescribed by the [Federal Communications Commission] pursuant to section 251." *Id.* § 252(c)(1).

All such agreements, whether "adopted by negotiation or arbitration[,] shall be submitted for approval to the State commission." *Id.* § 252(e)(1). The state

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[3] In general terms, "incumbent local exchange carriers" are those who, like petitioner Verizon Maryland Inc., were providing local telephone service on the date of enactment. 47 U.S.C. § 251(h).

commission must approve any negotiated terms unless they discriminate against a third-party telecommunications carrier or are inconsistent with the public interest. *Id.* § 252(e)(2)(A). In contrast, the state commission may reject any arbitrated terms if it finds that they "do[] not meet the requirements of section 251 . . . , including the regulations prescribed by the [FCC] pursuant to section 251 . . . , or the standards set forth in [§ 252(d)]." *Id.* § 252(e)(2)(B). Once an agreement is approved, the state commission has continuing "responsibility" under § 252 to "interpret and enforce" the agreement. Memorandum Opinion and Order, *Starpower Communications, LLC*, 15 FCC Rcd 11277, 11279-80, ¶ 6 (2000); *see also Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 947 (8th Cir. 2000) ("we can reach no conclusion but to agree with the FCC's determination that the state commissions' power to enforce interconnection agreements springs from § 252").

The 1996 Act does not *require* states to participate in this process. If a state chooses not "to carry out its responsibility under this section," the FCC "shall issue an order preempting the State commission's jurisdiction . . . and shall assume the responsibility of the State commission." 47 U.S.C. § 252(e)(5).[4] The state suffers no penalty in that event: the FCC proceeding and judicial review of that proceeding "shall be the exclusive remedies for a State commission's failure to act." *Id.* § 252(e)(6).

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[4] The option of declining to participate in the federal regulatory program is not a mere theoretical possibility offering states no genuine choice. The Virginia State Corporation Commission, for example, recently chose not to resolve a dispute between Bell Atlantic-Virginia, Inc. and Starpower Communications over the interpretation and enforcement of their interconnection agreement. The FCC, acting under § 252(e)(5), accordingly stepped in to assume the state commission's responsibility. *See Starpower Communications, LLC*, 15 FCC Rcd at 11278-79, ¶ 5.

If a state does choose to participate in the federal scheme, its determinations are subject to review in federal district court. Section 252(e)(6), entitled "Review of State commission actions," states: "In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of [§§ 251 and 252]." Federal district court is the exclusive forum for such review: the Act provides that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." *Id.* § 252(e)(4).

Regardless of whether a state chooses to participate in administering these requirements of federal law, the Act expressly preserves existing *state* laws regulating local telephone service, so long as those laws are consistent with federal law. *Id.* §§ 251(d)(3), 252(e)(3), 261(b). States therefore retain their traditional regulatory role with respect to matters not addressed by the 1996 Act.

2. The Dispute in this Case

The underlying dispute in this case concerns a ruling by the Maryland Public Service Commission ("PSC") requiring petitioner Verizon Maryland Inc. to pay, purportedly under the terms of its interconnection agreements with several competing carriers, "reciprocal compensation" for Internet-bound calls originated on Verizon's network.

The issue derives from the terms of the 1996 Act, which imposes on all local exchange carriers "[t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). Under "reciprocal compensation," when a customer of Carrier A places a call to a

customer of Carrier B in the same local area, Carrier A pays Carrier B for terminating that local call. Likewise, when a customer of Carrier B calls a customer of Carrier A, Carrier B pays Carrier A for terminating the call.

The FCC has ruled that the reciprocal-compensation obligation applies only to "local telecommunications traffic" (47 C.F.R. § 51.703(a)), defined as traffic that "originates and terminates within a local service area" (*id.* § 51.701(b)(1)). For non-local or "interexchange" calls, a different set of rules applies (those governing long-distance "access charges"). *See Local Competition Order*,[5] 11 FCC Rcd at 16013, ¶ 1034.

The question whether reciprocal compensation applies to Internet-bound calls — that is, whether Internet-bound calls are local or non-local in nature — has given rise to numerous disputes throughout the country. A customer typically initiates an Internet session by using a modem to connect initially to the facilities of an Internet service provider, or "ISP," such as America Online. The customer's computer then transmits the address of a requested website, which may be located anywhere in the world, and the ISP then completes the communication link by connecting the customer to the website.

Because Internet calls entail "a continuous transmission from the end user to a distant Internet site," and because "a substantial portion of Internet traffic involves accessing interstate or foreign websites," the FCC ruled in 1999 that "ISP-bound traffic is non-local interstate traffic" for which reciprocal compensation is

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[5] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996), *modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

not required under § 251(b)(5) and the FCC's implementing regulations.[6]

Prior to that ruling, the Maryland PSC had determined that Internet-bound calls do qualify as local traffic under the terms of Verizon's interconnection agreements, even though those agreements, while not specifically addressing the application of reciprocal compensation to Internet-bound calls, precisely track the language of § 251(b)(5) and the FCC's regulations. The PSC made clear, however, that its determinations were subject to revision based on subsequent FCC rulings bearing on the subject.

After the FCC ruled that Internet-bound calls do not qualify as local for purposes of reciprocal compensation under § 251(b)(5), Verizon asked the PSC to revise its prior determinations and hold that Verizon did not owe reciprocal compensation for Internet calls under the terms of its interconnection agreement with MFS Intelenet of Maryland, Inc. A sharply divided PSC denied that request by a vote of 3-2. *See* Pet. App. 91a-111a. It directed Verizon to continue paying reciprocal compensation for such calls not only to MFS Intelenet, but also to all other carriers that had adopted the relevant terms of that agreement. *See id.* at 107a.[7]

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[6] Declaratory Ruling, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 FCC Rcd 3689, 3699, 3702, 3706, ¶¶ 13, 18, 26 n.87 (1999), *vacated and remanded for further consideration, Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000), *proceedings on remand pending.*

[7] The other carriers were American Communications Services of Maryland, Inc., RCN Telecom Services of Maryland Inc., Starpower Communications, LLC, TCG-Maryland, and MCImetro Access Transmission Services LLC. Both MFS Intelenet and MCImetro Access are wholly owned subsidiaries of WorldCom, Inc. TCG-Maryland is a wholly owned subsidiary of AT&T Corp.

3. Proceedings Below

a. District Court. Verizon sought review of the PSC's decision in the United States District Court for the District of Maryland, citing as the basis for jurisdiction 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331. The complaint named as defendants the Maryland PSC, the members of the Maryland PSC in their official capacity, MFS Intelenet, and the five other affected carriers.

On the PSC's motion, the district court dismissed the complaint on the ground that the Eleventh Amendment precluded its exercise of subject matter jurisdiction under either § 252(e)(6) or § 1331. Pet. App. 73a-90a. The court's decision had three elements: (i) In the wake of *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), the PSC's voluntary exercise of federal authority under the 1996 Act cannot be treated as a constructive waiver of its Eleventh Amendment immunity to suit in federal court. Pet. App. 77a-79a. (ii) The decision in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), forecloses reliance on the *Ex parte Young* doctrine in this case. Pet. App. 79a-83a. (iii) The PSC was an indispensable party to the case, so dismissal of the case against the PSC and the commissioners required dismissal of the entire complaint. *Id.* at 84a-85a.

b. Court of Appeals. A divided panel of the Fourth Circuit affirmed. Pet. App. 1a-72a.

The majority began by rejecting Verizon's waiver argument. "Even assuming Congress conferred a gift on State utility commissions by allowing them to participate in the regulation of telecommunications — a gift that is difficult to discern — the language of § 252(e)(6) simply falls short" as a clear statement that such participation is conditioned on a waiver of sovereign immunity from suit in federal court. Pet. App.

19a-20a (footnote omitted). In the court's view, § 252(e)(6) "provides for federal court review of State commission *determinations*, but it does not provide that the State commission thereby agrees to be named as a party in federal court or that it waives its Eleventh Amendment immunity." *Id.* at 15a. The majority recognized that its holding on this point conflicted with decisions of the Fifth, Seventh, and Tenth Circuits.[8]

The court next held that the *Ex parte Young* doctrine does not permit this action to proceed against the individual members of the PSC in their official capacity to restrain ongoing violations of federal law. Relying on this Court's decision in *Seminole Tribe*, the majority stated: "If . . . we were to permit an *Ex parte Young* action to proceed against State officers, presumably to answer to a federal court injunction and potentially to face sanctions for non-compliance with that injunction, we would be supplementing the narrowly defined federal court review selected by Congress." Pet. App. 28a-29a. The court acknowledged that its holding on this point conflicted with decisions of the Fifth, Sixth, Seventh, and Tenth Circuits.[9]

Having ruled that neither the PSC nor its members could lawfully be made parties to the federal court action, the majority held next that the district court lacked jurisdiction under § 252(e)(6) to allow the action to proceed against the private defendants. In its view,

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[8] *See* Pet. App. 20a (citing *AT&T Communications v. BellSouth Telecomms., Inc.*, 238 F.3d 636, 646-47 (5th Cir. 2001); *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 342-44 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 896 (2001); *MCI Telecomms. Corp. v. Public Serv. Comm'n of Utah*, 216 F.3d 929, 938-39 (10th Cir. 2000), *cert. denied*, 121 S. Ct. 1167 (2001)).

[9] *See* Pet. App. 30a (citing *AT&T Communications*, 238 F.3d at 647-49; *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir.), *cert. denied*, 121 S. Ct. 54 (2000); *MCI Telecomms.*, 222 F.3d at 345; *MCI Telecomms.*, 216 F.3d at 939-40).

"State commission orders administering and enforcing interconnection agreements" — in contrast to orders approving or rejecting such agreements — "are not § 252 determinations." Pet. App. 47a. Rather, they are determinations made "within [the state commissions'] retained powers [under both federal and state law], and accordingly they are reviewable only by State courts in accordance with State law that the 1996 Act has preserved." *Id.*[10] The majority acknowledged that its decision on this point conflicted with decisions of the Fifth, Seventh, Eighth, and Tenth Circuits.[11]

Finally, the court held that "28 U.S.C. § 1331 does not provide federal jurisdiction over [Verizon's] claims" because, in its judgment, "Congress intended that federal jurisdiction be limited to the grant in 47 U.S.C. § 252(e)(6)." Pet. App. 50a. The court predicated its holding, in part, on its view that the *Rooker-Feldman* doctrine[12] — under which "lower federal courts are not authorized to review final judgments from State court proceedings" (*id.* at 50a n.8) — should be extended to prohibit, "in the absence of specific federal authorization," federal court review of orders issued by "a

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[10] According to the court of appeals, the Maryland PSC's authority to interpret and enforce 1996 Act agreements derives not from the 1996 Act itself but from "the [Communications Act of 1934] and Maryland law." *See* Pet. App. 41a (citing 47 U.S.C. § 152(b) and Md. Code Ann., Pub. Util. Cos. § 2-113 (1998)).

[11] *See* Pet. App. 44a-45a (citing *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 208 F.3d 475, 481 (5th Cir. 2000); *Illinois Bell Tel. Co. v. WorldCom Techs., Inc.*, 179 F.3d 566, 570-71 (7th Cir. 1999), *cert. granted sub nom. Mathias v. WorldCom Techs., Inc.*, No. 00-878 (Mar. 5, 2001); *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 946 (8th Cir. 2000); *Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Oklahoma, Inc.*, 235 F.3d 493, 497-98 (10th Cir. 2000)).

[12] The *Rooker-Feldman* doctrine refers to *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

State quasi-judicial body, such as the Maryland Public Service Commission." *Id.* at 50a. The court acknowledged that its ruling on § 1331 conflicted with the Sixth Circuit's decision in *GTE North, Inc. v. Strand*, 209 F.3d at 919. Pet. App. 50a.

Judge King dissented. Concerned that the majority had "isolate[d] itself . . . from every other court of appeals that has decided these issues" (*id.* at 52a), and "find[ing] these [other] decisions highly persuasive in addressing the jurisdictional and immunity issues" (*id.* at 53a-54a), Judge King concluded (i) that "§ 252(e)(6) expressly confers jurisdiction on the federal courts to review the states' enforcement determinations" (*id.* at 56a); (ii) that "a state waives the defense of sovereign immunity by electing to participate in the regulation of interconnection agreements" (*id.* at 59a); and (iii) that "[e]ven if Maryland had not waived its Eleventh Amendment immunity, the individual members of the Commission still may be sued in their individual capacities, pursuant to *Ex parte Young*, for prospective injunctive relief" (*id.* at 67a). Because Judge King believed that "jurisdiction is provided in the district courts by § 252(e)(6)," he found it "unnecessary . . . to reach the argument that 28 U.S.C. § 1331 confers general federal question jurisdiction." *Id.* at 58a n.5. He added, however, that, "contrary to the assertion of the majority, . . . the *Rooker-Feldman* doctrine has no application here." *Id.* (citation omitted).

REASONS FOR GRANTING THE PETITION

A. The Court Should Grant Certiorari To Ensure Timely Resolution of the Jurisdictional and Constitutional Issues on Which the Circuits Are Divided

This case presents squarely and without complication each of the three questions on which this Court granted certiorari in *Mathias*. If that were all, this would be an

obvious hold. But because this case also presents an independently important § 1331 issue that *Mathias* does not present, granting this petition and setting it for argument in tandem with *Mathias* would allow the Court to resolve next Term the full set of jurisdictional questions that currently divide the circuits. The Court would then have before it both possible sources of federal court jurisdiction — § 252(e)(6) and § 1331. That way, if the Court were to conclude that jurisdiction does not lie under § 252(e)(6) but does lie under § 1331, it would still have reason to reach the Eleventh Amendment questions on which the Fourth Circuit stands in stark disagreement with its sister circuits.

As we explained above, time is of the essence in the context of this statute. Because each of 50 state commissions has authority to interpret and enforce scores of individual interconnection agreements, and because their rulings have immediate and significant economic consequences for those affected, the parties have an urgent need for definitive guidance concerning their right to federal court review. If the Court were to leave the § 1331 issue off the table until a decision in *Mathias*, and if it were to hold that § 252(e)(6) does not apply to interpretation and enforcement actions, the resulting delay in resolving the existing circuit splits on § 1331 and on each of the two Eleventh Amendment issues would unduly prolong the current state of confusion.

To protect against that risk, the Court should grant certiorari in this case on at least the § 1331 question and both of the Eleventh Amendment questions and should set the case for argument in tandem with *Mathias*. Granting certiorari on only the § 1331 question would not accomplish the same objective. If the Court were to hold in *Mathias* that § 252(e)(6) does not provide subject matter jurisdiction, it would presumably dispose of the case on that basis without reaching

the Eleventh Amendment questions. *See, e.g., Texas v. Cobb*, No. 99-1702, slip op. at 4 (Apr. 2, 2001) ("Because we answer the first question in the negative, we do not reach the second."). If the Court were then to determine in this case that § 1331 *does* provide subject matter jurisdiction, it would still be unable to reach the Eleventh Amendment issues unless it has granted certiorari on those questions as well.

B. The Fourth Circuit Is in Conflict with the Sixth Circuit on the Question of § 1331 Jurisdiction

The court of appeals ruled that, where § 252(e)(6) does not apply, § 1331 gives a district court no independent subject matter jurisdiction to adjudicate a claim that a state commission's actions violate the 1996 Act. As the court itself recognized (Pet. App. 50a), that ruling put the Fourth Circuit in direct conflict with the Sixth Circuit, which had earlier held just the opposite in *GTE North, Inc. v. Strand*, 209 F.3d 909.

At issue in *GTE North* was a suit against members of the Michigan Public Service Commission challenging a PSC order as unlawful under the 1996 Act. The order — entered in a purportedly state-law proceeding unrelated to a specific interconnection agreement — directed GTE (a) to publish tariffs offering elements of its telephone network at PSC-prescribed rates, and (b) to allow competitors to purchase pre-assembled service platforms. *See* 209 F.3d at 914. The district court dismissed the complaint for lack of jurisdiction, reasoning that GTE's suit "was premature because the [Michigan PSC] had yet to issue a final order reviewable under § 252(e)(6)." *Id.* at 916.

The Sixth Circuit reversed. It held that "federal review is available under § 1331 to determine whether state commission orders violate federal law except in

cases in which the challenged regulatory action is clearly an interlocutory order arising out of § 252 proceedings." *Id.* at 919. The Michigan PSC argued, much as the Maryland PSC argued in this case, that "'there is neither a need nor a requirement for the federal District Court to review [the PSC's order]' because that order is fully reviewable in Michigan state court." *Id.* at 922. In the Sixth Circuit's view, however, that argument, though it "may be relevant to the question whether the district court should abstain from deciding GTE's claims," was "wholly irrelevant" to whether the federal district court had federal-question jurisdiction to hear GTE's claims. *Id.* at 922-23.

In contrast to the Sixth Circuit, the Fourth Circuit held that "Congress created a limited federal right of review of State commission determinations as defined in 47 U.S.C. § 252(e)(6), and otherwise it intended for the right of review to be exercised in State courts." Pet. App. 49a. The court further held that "it would violate basic tenets of federalism to conclude, in the absence of specific federal authorization, that a federal court may review a State quasi-judicial body, such as the Maryland Public Service Commission." *Id.* at 50a.

The conflict is stark. The rule in the Sixth Circuit is that, in the absence of a specific *limitation* in the 1996 Act, § 1331 provides general federal-question jurisdiction to review claims alleging that a state commission's order violates the 1996 Act. The rule in the Fourth Circuit is that, in the absence of a specific *authorization* in the 1996 Act, § 1331 does *not* provide general federal-question jurisdiction to review claims alleging that a state commission's order violates the 1996 Act. As a result, for cases in which § 252(e)(6) review is not available for reasons other than the interlocutory nature of the state commission's order, parties in the Sixth Circuit retain a federal forum for pursuit of their

claims, but parties in the Fourth Circuit must pursue their claims, if at all, solely in state courts.

It is important for this Court to resolve the split expeditiously to minimize the adverse effect of this unwarranted disparity in the administration of a federal telecommunications statute that has far-reaching consequences for consumers and for the nation's economy.

C. The Fourth Circuit Reached the Wrong Conclusion on § 1331 Jurisdiction

Even if the Fourth Circuit were correct in holding that the jurisdiction conferred by § 252(e)(6) is limited to review of a state commission's initial approval or rejection of an interconnection agreement, the court was wrong to hold that § 1331 provides a federal district court with no independent subject matter jurisdiction to determine whether a state commission's action interpreting or enforcing a previously approved 1996 Act interconnection agreement violates federal law.

1. As this Court's precedents make clear, a civil action "arises under" federal law for purposes of § 1331 when a "right or immunity created by the Constitution or laws of the United States [is] an element, and an essential one, of the plaintiff's cause of action." *Gully v. First Nat'l Bank*, 299 U.S. 109, 112 (1936); *accord City of Chicago v. International College of Surgeons*, 522 U.S. 156, 163-64 (1997).

That test is satisfied here. In the 1996 Act, Congress granted incumbent carriers the statutory right to "negotiate and enter into *a binding agreement* with the requesting telecommunications carrier or carriers," and to do so, moreover, "without regard to the standards set forth in [§ 251(b) and (c)]." 47 U.S.C. § 252(a) (emphasis added). Federal law thus gives Verizon the right to insist that it be held only to the terms of the intercon-

nection agreement to which it actually agreed. Any departure from those terms would violate § 252(a) by negating the agreement's "binding" effect. For example, if a state commission, in furtherance of a state policy favoring reciprocal compensation for Internet-bound traffic, were to disregard an agreement's terms restricting reciprocal compensation to local traffic, a federal district court would have jurisdiction under § 1331 to require adherence to the terms of the agreement under § 252(a).

That is essentially what happened in this case. Verizon's complaint alleged that the Maryland PSC, while purporting to interpret a previously approved interconnection agreement, effectively negated the agreement's terms, which limited reciprocal compensation to "Local Traffic," by incorrectly imputing to the parties an unexpressed intention to extend reciprocal compensation also to Internet-bound traffic. Verizon further alleged that the PSC had predicated its ruling on a mistaken understanding of the governing principles of federal law. *See* Complaint ¶¶ 1-5, 37, 40 (C.A. App. 117-18, 126, 127). Because Verizon's claim arose under federal law, the district court had subject matter jurisdiction under § 1331.

2. Even if Congress had not made the federal right at issue here so plain in § 252(a), three related lines of this Court's precedents teach that a claim such as this one would in any event fall within the federal courts' jurisdiction.

a. Contrary to the court of appeals' apparent understanding, interconnection agreements are not ordinary state-law contracts, but rather "federal contract[s]," the interpretation or enforcement of which, under this Court's precedents, raises questions of federal law subject to federal court jurisdiction under § 1331. *International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 692 (1963).

Unlike ordinary commercial contracts, which reflect voluntary undertakings by willing parties acting without legal compulsion, 1996 Act interconnection agreements are the product of federal legal coercion designed to implement federal obligations. Incumbent local exchange carriers such as Verizon are required by federal law to negotiate these agreements to discharge their obligations under the 1996 Act — specifically, "to fulfill the duties described in [§ 251(b) and (c)]." 47 U.S.C. § 251(c)(1). Federal law, moreover, requires incumbents to enter into good-faith negotiations at the behest of a requesting carrier even if they would otherwise be unwilling to do so — indeed, even if state law would otherwise *prohibit* such inter-carrier negotiations and agreements. *See id.* § 261(c).

Moreover, federal law enumerates the specific duties that are subject to negotiation, establishes the minimum terms to which an incumbent must "agree" on request, and subjects the resulting "agreements" to governmental approval under specified federal standards, without which the agreement has no effect. *See id.* §§ 251(b)-(c), 252(e). Federal law further requires that these agreements be publicly filed, and it provides that the incumbent carrier must make the provisions of any approved interconnection agreement available to any other requesting carrier on the same terms and conditions. *See id.* § 252(h), (i). Finally, once such an agreement is approved, the incumbent has a federal-law duty to provide service "in accordance with" the agreement's terms. *See id.* § 251(c)(2)(D).

The circumstances here, therefore, are analogous to those in *Machinists*, which involved a suit to enforce an arbitration award issued under the terms of a labor contract implementing requirements of the Railway Labor Act. Holding that the action arose under federal law for purposes of § 1331, the Court stated, in terms that could just as well apply to this case, that the

contracts at issue — "creations of federal law and bound to the statute and its policy" — were necessarily "governed and enforceable by federal law, in the federal courts." 372 U.S. at 692.[13] Other cases are to the same effect. *See, e.g., Norfolk & Western Ry. v. Nemitz*, 404 U.S. 37 (1971) (concluding that a dispute arising out of an agreement implementing obligations under the Interstate Commerce Act raised a federal question); *American Surety Co. v. Schultz*, 237 U.S. 159 (1915) (holding that suit to enforce an appeal bond given to satisfy requirements of federal law raised a federal question).

Just as the issues arising out of an arbitrator's award under a Railway Labor Act contract raised federal questions for purposes of § 1331, so too the issues arising out of a state commission's interpretation or enforcement of a 1996 Act agreement necessarily raise federal questions within the scope of a district court's jurisdiction under § 1331.

Although the Fourth Circuit sought support for its contrary view in this Court's decision in *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15 (1982), that case actually cuts in the opposite direction. The Court there stated that § 1331 provides jurisdiction when a plaintiff "sue[s] to vindicate contractual rights set forth by federal statutes"; that is so, moreover, even where "the relevant statutes lack[] express provisions creating federal causes of action." *Id.* at 22. The decisive question is whether Congress intended the contracts at issue to be "'creations of federal law'" and "the rights

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[13] The Court explained, again in terms that equally fit this case, that, "[i]f any provision contained in [such a] contract is enforceable, it is because of congressional sanction: '[T]he federal statute is the source of the power and authority . . . though it takes a private agreement to invoke the federal sanction.'" 372 U.S. at 692 (quoting *Railway Employes' Dep't v. Hanson*, 351 U.S. 225, 232 (1956)).

and duties contained in those contracts [to] be federal in nature." *Id.* at 23 (quoting *Machinists*, 372 U.S. at 692).

The circumstances here amply satisfy that standard. Congress, among other things, required incumbent carriers to negotiate interconnection agreements to fulfill federal-law duties, established the standards under which the agreements were to be approved or rejected, specified that the agreements would be "binding" as a matter of federal law regardless of any contrary state-law policy, and created a federal-law obligation to act "in accordance with" the terms of those agreements. The resulting agreements are therefore quintessentially creations of federal law intended to implement federal rights and duties.

In *Jackson Transit*, the Court determined, based on explicit legislative history, that Congress intended the suits at issue to proceed in state court and thus that the plaintiff had failed to state a claim. *See* 457 U.S. at 21 n.6, 24-28. Contrary to the Fourth Circuit's view, however, that is not the case here. Nothing in the text or legislative history of the 1996 Act supports the proposition that, insofar as § 252(e)(6) does not apply, Congress "intended for the right of review to be exercised in State courts." Pet. App. 49a.

b. A related principle likewise supports § 1331 jurisdiction in this case. Because federal law mandates the existence of interconnection agreements, requires a carrier to provide service according to their terms, directs that they be published, and specifies that service must be made available on the same terms to all parties, these 1996 Act agreements are substantively indistinguishable from federal tariffs. And, as this Court has held repeatedly, a claim involving enforcement of a federal tariff necessarily arises under federal law and presents questions reviewable in federal court. *See Thurston Motor Lines, Inc. v. Jordan*

K. Rand, Ltd., 460 U.S. 533, 534 (1983) (per curiam); *Louisville & N.R.R. v. Rice*, 247 U.S. 201, 202 (1918).

The Court in *Thurston Motor Lines* ruled that even a simple collection action under a federal tariff raised federal questions. Because the "'dut[ies] and obligation[s]'" under such a tariff "'grow out of and depend upon'" the Interstate Commerce Act, which required the carrier to file such tariffs and to collect all lawful charges prescribed by the tariff, an action to enforce the tariff is within the subject matter jurisdiction of the federal courts. 460 U.S. at 534 (quoting *Rice*, 247 U.S. at 202); *see Great Northern Ry. v. Merchants' Elevator Co.*, 259 U.S. 285, 290 (1922) (Brandeis, J.) ("Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of federal law."). The same principle applies to a claim that a state commission's interpretation or enforcement of an interconnection agreement violates federal law.

An incumbent carrier's "duties and obligations" under a 1996 Act interconnection agreement likewise arise from federal law, and that is true even if, as here, the particular terms at issue were the result of "voluntary" negotiation rather than arbitration. Indeed, such negotiations necessarily occur against the backdrop of statutory and regulatory requirements that dictate the minimum terms to which an incumbent carrier will be held in the absence of a negotiated agreement. As the Fourth Circuit itself explained in a prior 1996 Act case, because many of the disputes between two parties "will have been previously resolved by . . . FCC Rules and interpretations," "many so-called 'negotiated' provisions represent nothing more than an attempt to comply with the requirements of the 1996 Act." *AT&T*

Communications of Southern States, Inc. v. BellSouth Telecomms., Inc., 229 F.3d 457, 465 (4th Cir. 2000).[14]

c. Yet another line of this Court's cases stands for the proposition that federal court review is presumptively available when an agency wielding federal power adjudicates the rights of private parties, even if no statute expressly authorizes such review. Thus, in *Stark v. Wickard*, 321 U.S. 288 (1944), milk producers sought a federal court injunction against the enforcement of a Department of Agriculture order setting the minimum price for milk. The Court held that "the silence of Congress as to judicial review is . . . not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction." *Id.* at 309. In the absence of a specific jurisdictional grant, courts are presumed to have "general federal-question jurisdiction under 28 U.S.C. § 1331" to hear such claims. *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 494 (1991); *see also Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 56 (1993).

Indeed, so long as a party raises federal-law questions, a district court has subject matter jurisdiction even if the plaintiff's cause of action is based on a state-law agency-review provision. *See City of Chicago*, 522 U.S. at 163-65; *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13 (1983) ("Even though state law creates appellant's causes of action, its case might still 'arise under' the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a

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[14] It is well recognized, of course, that tariffs can be based on negotiated agreements. *See, e.g., Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) (applying the filed-rate doctrine to a negotiated contract filed with the Federal Energy Regulatory Commission as a tariff); 47 C.F.R. § 61.55 (governing "contract-based tariffs").

substantial question of federal law in dispute between the parties.").

Those precedents apply here. Even assuming that an enforcement decision is not a "determination" for purposes of § 252(e)(6), a state commission's authority to superintend these federally mandated agreements necessarily comes from federal, not state, law. The FCC has squarely held that such determinations involve state commission "responsibilities" under the federal Act and thus that the FCC must step in and resolve the matter if (but only if) a state commission declines to do so. *See Starpower Communications*, 15 FCC Rcd at 11279-80, ¶ 6; *see also* 47 U.S.C. § 252(e)(5). As the Seventh Circuit aptly put it, by resolving these disputes, a state commission acts as a "deputized" federal regulator and "regulat[es] on behalf of Congress" when it enforces a 1996 Act interconnection agreement. *MCI Telecomms.*, 222 F.3d at 343, 344. Even the Fourth Circuit acknowledged that a state commission's "explicit authority" to act rests in part on the Communications Act. *See* Pet. App. 41a.

3. The Fourth Circuit's holding — that a federal district court lacks § 1331 jurisdiction to determine whether a state commission's interpretation or enforcement of an interconnection agreement violates the 1996 Act — not only collides with this Court's precedents, but also produces an anomalous scheme that Congress could not have contemplated. Under the Fourth Circuit's approach, the availability of federal district court review would depend entirely on whether a dispute happens to arise early enough to be decided in an arbitration. If it does, the aggrieved party has access to the federal courts under § 252(e)(6); if precisely the same dispute surfaces only after an agreement has been approved, the aggrieved party has no access to the federal courts, even under § 1331.

This case provides a good example of the problem. As noted, the core issue here is whether reciprocal compensation is required for Internet-bound calls. If that issue had arisen during negotiations, the parties would have requested arbitration, and the Maryland PSC would have been bound to apply federal law in resolving the dispute. *See* 47 U.S.C. § 252(c). But in fact the issue was latent at the arbitration stage. The parties adopted a provision that simply tracks the statute and the FCC's reciprocal-compensation rule without addressing the specific question of Internet-bound traffic.[15]

Because the agreement's provisions mirror federal law, the substantive question here is no different from the question that would have been raised had the dispute arisen during negotiations — whether the 1996 Act and the FCC's implementing regulation require reciprocal compensation for Internet-bound traffic. But, under the Fourth Circuit's approach, that issue would now be transformed into one that raises no federal question for purposes of § 1331. The conclusion that the same legal issue is within the jurisdiction of the federal courts when raised at one time but not when raised at another time is not only "surpassing strange" (*AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366,

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[15] In particular, the relevant provision of Verizon's agreement with MFS (entitled "Reciprocal Compensation Arrangements – Section 251(b)(5)") provides, in terms essentially identical to those in the FCC's regulation, that the parties "shall compensate each other for transport and termination of Local Traffic"; it defines "Local Traffic," again in terms that track the FCC's regulation, as "traffic that is originated by a Customer of one Party on that Party's network and terminates to a Customer of the other Party on that other Party's network, within a given local calling area." Agreement §§ 1.44, 5.7.2 (C.A. App. 53, 58); *see* 47 C.F.R. § 51.701(a), (b)(1). To underscore the parties' intention to adhere closely to what the statute itself requires, the agreement further states that "'Reciprocal Compensation' is As Described in the [1996] Act." Agreement § 1.61 (C.A. App. 55).

378 n.6 (1999)); it is also directly contrary to the Court's conclusion that, under the 1996 Act, "if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel" (*id.*).

Finally, nothing in this Court's precedents supports the Fourth Circuit's unwarranted extension of the *Rooker-Feldman* doctrine to the circumstances of this case. As this Court has explained, the *Rooker-Feldman* doctrine "interprets 28 U.S.C. § 1257 as ordinarily barring direct review in the lower federal courts of a decision reached by the highest state court, for such authority is vested solely in this Court." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 622 (1989). That limited statutory construction has no application here. When a state agency, acting as a voluntary federal regulator, determines the rights and obligations of parties to an agreement that is itself a creation of federal law, the *Rooker-Feldman* doctrine's interpretation of 28 U.S.C. § 1257 cannot sensibly be extended to foreclose a district court's exercise of general federal-question jurisdiction under § 1331 to determine whether the state agency's decision violates federal law.

Indeed, the Fourth Circuit's novel view that "basic tenets of federalism" justify applying the *Rooker-Feldman* doctrine to bar review of a state administrative agency's decision (Pet. App. 50a) is contrary to the views of the four other circuits that have addressed the question, each of which determined that the doctrine does not apply to decisions of such agencies. *See Van Harken v. City of Chicago*, 103 F.3d 1346, 1348-49 (7th Cir. 1997) (Posner, J.); *Narey v. Dean*, 32 F.3d 1521, 1525-26 (11th Cir. 1994); *Scott v. Flowers*, 910 F.2d 201, 208 (5th Cir. 1990); *Ivy Club v. Edwards*, 943 F.2d 270, 284 (3d Cir. 1991).

CONCLUSION

The petition for a writ of certiorari should be granted, at least as to questions 2, 3, and 4, and the case should be set for oral argument in tandem with *Mathias v. WorldCom Techs., Inc.*, No. 00-878. Alternatively, the petition should, at a minimum, be held pending the decision in *Mathias* and then disposed of as appropriate in light of that decision.

Respectfully submitted,

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April 5, 2001

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-2459

BELL ATLANTIC MARYLAND, INCORPORATED,
Plaintiff-Appellant,

v.

MCI WORLDCOM, INCORPORATED; AMERICAN COMMUNICATIONS SERVICES OF MARYLAND, INCORPORATED; RCN TELECOM SERVICES OF MARYLAND, INCORPORATED; STARPOWER COMMUNICATIONS, LLC; TCG-MARYLAND; MCIMETRO ACCESS TRANSMISSION SERVICES, INCORPORATED; THE PUBLIC SERVICE COMMISSION OF MARYLAND; GLENN F. IVEY, in his official capacity as Chairman of the Public Service Commission of Maryland; CLAUDE M. LIGON, in his official capacity as Commissioner of the Public Service Commission of Maryland; E. MASON HENDRICKSON, in his official capacity as Commissioner of the Public Service Commission of Maryland; SUSAN BROGAN, in her official capacity as Commissioner of the Public Service Commission of Maryland; CATHERINE I. RILEY, in her official capacity as Commissioner of the Public Service Commission of Maryland,
Defendants-Appellees,

UNITED STATES OF AMERICA,
Intervenor/
Defendant-Appellee,

MARYLAND OFFICE OF PEOPLE'S COUNSEL,
Defendant.

No. 99-2616

BELL ATLANTIC MARYLAND, INCORPORATED,
Plaintiff,

and

UNITED STATES OF AMERICA,
Intervenor/
Defendant-Appellant,

v.

THE PUBLIC SERVICE COMMISSION OF MARYLAND; GLENN F. IVEY, in his official capacity as Chairman of the Public Service Commission of Maryland; CLAUDE M. LIGON, in his official capacity as Commissioner of the Public Service Commission of Maryland; E. MASON HENDRICKSON, in his official capacity as Commissioner of the Public Service Commission of Maryland; SUSAN BROGAN, in her official capacity as Commissioner of the Public Service Commission of Maryland; CATHERINE I. RILEY, in her official capacity as Commissioner of the Public Service Commission of Maryland,
Defendants-Appellees,

and

AMERICAN COMMUNICATIONS SERVICES OF MARYLAND, INCORPORATED; RCN TELECOM SERVICES OF MARYLAND, INCORPORATED; STARPOWER COMMUNICATIONS, LLC; TCG-MARYLAND; MCIMETRO ACCESS TRANSMISSION SERVICES, INCORPORATED; MARYLAND OFFICE OF PEOPLE'S COUNSEL; MCI WORLDCOM, INCORPORATED,
Defendants.

On Appeals from the United States District Court for the District of Maryland, at Baltimore
Frederic N. Smalkin, District Judge
(CA-99-2061-S)

Argued May 1, 2000
Decided Feb. 14, 2001

Before WIDENER, NIEMEYER, and KING, Circuit Judges.

OPINION

NIEMEYER, Circuit Judge:

Seeking review of a decision made by the Maryland Public Service Commission on reciprocal-compensation rights under telecommunications interconnection agreements within its jurisdiction, Bell Atlantic Maryland, Inc. ("Bell Atlantic") filed this action in federal court against the commission, its individual members in their official capacity, and the parties to the interconnection agreements. Bell Atlantic relied on the Telecommunications Act of 1996 as authority for naming the Public Service Commission and its members as defendants and for filing in federal court.

The district court dismissed the action against the State parties under the Eleventh Amendment. Then, concluding that these State parties were indispensable parties under Federal Rule of Civil Procedure 19, it dismissed the action against the private parties on jurisdictional grounds.

While we agree with much of the reasoning in the district court's opinion, we adopt a different rationale on the jurisdictional issues and affirm.

I. Background

Congress enacted the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §§ 151-614) (sometimes the "1996 Act")

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge Widener joined. Judge King wrote a dissenting opinion.

with the purpose of reducing regulation in the telecommunications industry and promoting competition. As part of that effort, the 1996 Act enables local exchange carriers ("LECs") to use each other's local exchange networks by requiring them to enter into interconnection agreements or be subject to arbitration to impose interconnection agreements. In particular, the 1996 Act requires, among other things, that each LEC, through such an interconnection agreement, "afford access" to its facilities and local network exchange to "any requesting telecommunications carrier," "provide interconnection" to that network, and "establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(4), (b)(5), (c)(2). Through such reciprocal compensation arrangements, LECs compensate each other for intercarrier calls. Thus, if a subscriber of carrier A calls a subscriber of carrier B, then carrier A must share with carrier B some of the revenues collected from the calling-subscriber to compensate carrier B for use of its facilities. Under regulatory authority conferred by the 1996 Act, the Federal Communications Commission ("FCC") has construed the scope of the reciprocal compensation obligation to apply to the "transport and termination of *local* telecommunications traffic." 47 C.F.R. § 51.701(a) (emphasis added). The interconnection agreements, whether reached through voluntary negotiation or through arbitration, are subject to review by State public service commissions and thereafter, in circumstances specified by the 1996 Act, by federal courts and in other circumstances, by State courts.

Bell Atlantic, the incumbent LEC in Maryland, entered into an interconnection agreement with a competing LEC, MFS Intelnet of Maryland, Inc., later succeeded by MCI WorldCom, Inc. ("MCI"), and the Maryland Public Service Commission approved that agreement in October 1996. Shortly thereafter, the parties found themselves in a dispute over whether Bell

Atlantic had to pay reciprocal compensation for its subscribers' telephone calls made to Internet Service Providers ("ISPs") that have local telephone numbers but provide access to interstate destinations through the Internet. Bell Atlantic maintained that ISP-bound telephone calls are not "local traffic" and therefore do not trigger reciprocal compensation obligations either under the 1996 Act or under the parties' interconnection agreement. MCI, on the other hand, took the position that ISP-bound calls are local traffic subject to reciprocal compensation because the calls to the ISP numbers are local. The parties agree that this issue involves substantial sums of money.

To resolve the dispute, MCI filed a complaint against Bell Atlantic before the Maryland Public Service Commission, alleging that Bell Atlantic was in breach of its interconnection agreement with MCI and requesting relief in the form of a cease-and-desist order. The Public Service Commission issued an order on August 13, 1997, finding in favor of MCI and directing Bell Atlantic "to timely forward all future interconnection payments owed [MCI] for telephone calls placed to an ISP" and to pay MCI any reciprocal compensation that it had withheld pending resolution of the dispute. The Public Service Commission based its decision on the terms of the parties' interconnection agreement. It noted, however, that the issue of whether ISP-bound calls are properly characterized as local traffic was pending before the FCC and invited the parties to return "[i]n the event that the FCC issues a decision that requires revision to the directives announced herein." Bell Atlantic appealed the Public Service Commission's order to the Circuit Court for Montgomery County, Maryland, and that court upheld the Public Service Commission decision. *See Bell Atlantic-Maryland, Inc. v. Maryland PSC*, Civil Action No. 178260, Docket Entry # 36, March 26, 1998. Bell Atlantic took no further appeal to higher Maryland courts.

Almost a year later, on February 26, 1999, the FCC issued a ruling (since vacated by the United States Court of Appeals for the D.C. Circuit) that declared ISP-bound traffic to be non-local. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP Bound Traffic*, 14 FCC Rcd 3689, 3690 (¶ 1) (1999) ("FCC Ruling"), *vacated, Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). Relying on this declaratory ruling, Bell Atlantic submitted a petition to the Maryland Public Service Commission seeking a declaration that it did not, after all, owe MCI reciprocal compensation for ISP-bound traffic under the parties' interconnection agreement. In a 3-2 decision, the Maryland Public Service Commission denied Bell Atlantic's petition on June 11, 1999. The Public Service Commission recognized that the FCC's ruling had determined that ISP-bound traffic generally was interstate traffic, but it noted that the FCC also indicated that parties to interconnection agreements "may reasonably have agreed, for the purposes of determining whether reciprocal compensation should apply to ISP-bound traffic, that such traffic should be treated in the same manner as local traffic" (quoting FCC Ruling, 14 FCC Rcd at 3703-04 (¶ 24)). Indeed, the FCC also concluded that "[w]here parties have agreed to include this traffic within their . . . interconnection agreements, they are bound by those agreements, as interpreted and enforced by the state commissions." FCC Ruling, 14 FCC Rcd at 3703 (¶ 22). With this understanding of the FCC's order, the Maryland Public Service Commission found, as a matter of contract interpretation, that MCI and Bell Atlantic had agreed to treat ISP-bound traffic as local traffic subject to reciprocal compensation. In addition, the Public Service Commission stated that, in the absence of a voluntarily negotiated agreement between LECs with respect to the treatment of ISP-bound calls, the Public Service Commission would treat such ISP-bound traffic as local and thus subject to reciprocal compensation

"[u]ntil such time as a federal inter-carrier compensation mechanism is developed."

Seeking review of the Public Service Commission's decision, Bell Atlantic filed this action in federal court on July 12, 1999, naming as defendants the Maryland Public Service Commission, its individual members in their official capacity, MCI, and other competing LECs. Bell Atlantic's complaint sought a declaratory judgment that the Maryland Public Service Commission had violated the Telecommunications Act of 1996 by failing to apply and by misinterpreting the FCC Ruling. Bell Atlantic also sought an injunction prohibiting enforcement of the Maryland Public Service Commission's determinations and requiring the Public Service Commission to order the competing LECs to refund reciprocal compensation obtained from Bell Atlantic for ISP-bound traffic.

The Maryland Public Service Commission and its individual members filed a motion to dismiss the complaint, asserting the action was barred by the Eleventh Amendment. The Public Service Commission also contended that because it was an indispensable party to any action filed to review its decisions, the federal court could not proceed with the action in the absence of the Public Service Commission as a party.

The United States intervened and joined Bell Atlantic and the other private defendants in opposition to the motion to dismiss. These parties argued that the Maryland Public Service Commission had constructively waived its sovereign immunity with respect to this action by participating in the regulatory scheme established by the 1996 Act. They argued in the alternative that the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), would permit the suit to go forward against the individual commission members in their official capacities. In addition, Bell Atlantic and the other private defendants argued that the Public Service Commission in any event was not an indispensable party and that this action therefore could proceed in

the absence of the Public Service Commission as a party.

The district court granted the motion to dismiss, holding (1) that the action against the Public Service Commission and the individual commissioners was barred by the Eleventh Amendment; (2) that the doctrine of *Ex parte Young* did not apply to permit this action against the individual commissioners under the reasoning of *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); and (3) that the Maryland Public Service Commission was an indispensable party without which the action could not proceed. This appeal followed.

II. Eleventh Amendment Principles

The Maryland Public Service Commission, as an agency of the State of Maryland, and its individual commissioners in their official capacity (collectively "the State") assert that they are immune from suit in federal court under the doctrine of sovereign immunity as guaranteed in federal court by the Eleventh Amendment. The State asserts that it has not waived its sovereign immunity; that Congress has not sought to exercise its power, under the Fourteenth Amendment, to abrogate the State's sovereign immunity in the Telecommunications Act; and that therefore the Eleventh Amendment is a complete bar to suit against the State in federal court. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993).

Bell Atlantic and the United States, as an intervenor, contend that the State has implicitly waived its immunity from private suit in federal court by participating in the regulatory scheme created by the Telecommunications Act of 1996. They point out that Congress had no obligation to give States any role in regulating the telecommunications industry. They argue that by giving such a role to the States, Congress conferred upon the States a gift which was conditioned

on their amenability to suit in federal court under 47 U.S.C. § 252(e)(6). They note that the State had a clear choice—given in 47 U.S.C. § 252(e)(5)—either to participate in the regulation of interconnection agreements or to forego such a role and allow the FCC to act in its stead. In any event, Bell Atlantic and the United States argue that Bell Atlantic's suit against the individual State commissioners in their official capacity is permitted under the doctrine of *Ex parte Young*, 209 U.S. 123, because Bell Atlantic is seeking only declaratory and injunctive relief against State officials to prevent an ongoing violation of federal law. They argue that the Maryland Public Service Commission violated federal law in reaching a decision contrary to the FCC's declaratory ruling that ISP-bound traffic is non-local and therefore not subject to reciprocal compensation obligations.

The district court found that the Eleventh Amendment barred Bell Atlantic's action against the State. It noted that the notion of constructive waiver of Eleventh Amendment immunity was recently repudiated by the Supreme Court's decision in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999) (stating that "constructive waiver is little more than abrogation under another name"). In addition, the district court concluded that the State did not waive its Eleventh Amendment immunity as a condition to receipt of a gift from Congress. The court stated, "It is beyond this Court's imagination how Congress' offer to the States to participate as regulators in the very federal scheme that divested them of their local power can be considered a 'gift,' and it is certainly not one that the states could freely decline to accept." The district court also rejected Bell Atlantic's attempt to sue the individual commissioners under *Ex parte Young*. Relying on *Schweiker v. Chilicky*, 487 U.S. 412 (1988) ("When the design of a Government program suggests that Congress has provided what it considers adequate

remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional . . . remedies"), the district court concluded that Congress explicitly precluded an *Ex parte Young* action against individual commissioners, observing that federal jurisdiction was granted to review determinations made under 47 U.S.C. § 252 by "State commissions," not by individual commissioners. Additionally, the district court noted that an *Ex parte Young* action against the individual State commissioners would expose them to "the full remedial powers of a federal court, including, presumably, contempt sanctions," *Seminole Tribe*, 517 U.S. at 75, not the limited federal review—provided in 47 U.S.C. § 252(e)(6)—of determinations made by State commissions to ensure that interconnection agreements comply with federal requirements. The district court concluded, "In short, this Court cannot recognize an implied cause of action against the Commissioners under *Ex parte Young*, because the Court infers from the 1996 Act that Congress did not authorize such federal jurisdiction." The district court noted that two other district courts had reached the same conclusion. *See Wisconsin Bell, Inc. v. Public Serv. Comm'n of Wis.*, 57 F. Supp. 2d 710 (W.D. Wis. 1999), *rev'd*, *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323 (7th Cir. 2000); *AT&T Communications v. BellSouth Telecomms., Inc.*, 43 F. Supp. 2d 593 (M.D. La. 1999), *rev'd*, *AT&T Communications v. BellSouth Telecomms., Inc.*, ___ F.3d ___, 2001 WL 38281 (5th Cir. 2001).

In addressing these issues framed by the parties, we must conduct our analysis with respect for the principles of federalism, which guide and shape Eleventh Amendment doctrine and which inform our reluctance to infer any negation of a State's immunity from suit absent (1) a valid abrogation of that immunity by Congress, (2) a State's clear and unequivocal waiver of immunity, or (3) the prosecution of an action that fits comfortably within the doctrine of *Ex parte Young*.

It is by now well established that the States' "residuary and inviolable sovereignty," protected by the Eleventh Amendment, precludes private suits against non-consenting States.[1] *Alden v. Maine*, 527 U.S. 706, 715 (1999) (quoting The Federalist No. 39, at 245 (J. Madison) (C. Rossiter ed. 1961)); *see also Seminole Tribe*, 517 U.S. at 54; *Hans v. Louisiana*, 134 U.S. 1, 13 (1890). And the Supreme Court has repeatedly emphasized that a State's sovereign immunity is not strictly limited by the text of the Eleventh Amendment[2] because the Amendment merely confirms State sovereign immunity as a preexisting constitutional principle, which plays a vital role in our constitutional structure. *See Alden*, 527 U.S. at 712-13; *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267-68 (1997); *Seminole Tribe*, 517 U.S. at 54; *see also Litman v. George Mason Univ.*, 186 F.3d 544, 549 (4th Cir. 1999), *cert. denied*, 528 U.S. 1181 (2000); *Creative Goldsmiths, Inc. v. Maryland*, 119 F.3d 1140, 1144 (4th Cir. 1997). It is a State's sovereign immunity that limits the degree to which the State is subject to the federal power. This principle "accords the States the respect owed them as members of the federation," *Alden*, 527 U.S. at 748-49 (quoting *Puerto Rico Aqueduct*, 506 U.S. at 146), and avoids the indignity of States being subjected to the "coercive process of judicial tribunals at the instance of private parties," *Seminole Tribe*, 517 U.S. at 58 (quoting *Puerto Rico Aqueduct*, 506 U.S. at 146).

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[1] A State's sovereign immunity does not preclude suits brought in federal court by the federal government, *see United States v. Texas*, 143 U.S. 621, 644-45 (1892), or by a sister State, *see South Dakota v. North Carolina*, 192 U.S. 286, 318 (1904), because inherent in the plan of the Constitutional Convention was the surrender by the States of immunity as to these suits, *see Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781-82 (1991).

[2] The Eleventh Amendment provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

While State sovereign immunity is an inherent feature of our federal structure, so too are limitations on that immunity, a consequence of the People's grant of authority to a federal government. Thus, Congress can abrogate the sovereign immunity of nonconsenting States if (1) it validly acts "pursuant to a constitutional provision granting Congress the power to abrogate," and (2) it "unequivocally expresse[s] its intent to abrogate the immunity." *Seminole Tribe*, 517 U.S. at 55. The Supreme Court has recognized that § 5 of the Fourteenth Amendment, designed as it was to "expand[] federal power at the expense of state autonomy," grants Congress a power of abrogation that "intrude[s] upon the province of the Eleventh Amendment." *Seminole Tribe*, 517 U.S. at 59; *see also Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-56 (1976).

In addition, to ensure the supremacy of federal law, a State's sovereign immunity under the Eleventh Amendment is lifted in certain cases to allow federal jurisdiction over suits that seek prospective injunctive relief against a State officer alleged to be perpetrating an ongoing violation of federal law. *See Ex parte Young*, 209 U.S. 123; *see also Alden*, 527 U.S. at 747; *Seminole Tribe*, 517 U.S. at 73-74; *Green v. Mansour*, 474 U.S. 64, 68 (1985); *Edelman v. Jordan*, 415 U.S. 651, 663-68 (1974); *CSX Transp., Inc. v. Board of Pub. Works*, 138 F.3d 537, 540-41 (4th Cir. 1998), *cert. denied*, 525 U.S. 821 (1998); *Republic of Paraguay v. Allen*, 134 F.3d 622, 627 (4th Cir. 1998). Even though the injunctive relief, if ordered, would undoubtedly affect the State, sovereign immunity does not bar such a suit because a State official who acts contrary to federal law is "stripped of his official or representative character." *Ex parte Young*, 209 U.S. at 160. The Supreme Court has declined, however, to extend this principle to suits seeking retrospective monetary relief, reasoning that "to do so would effectively eliminate the constitutional immunity of the States." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) ("*Pennhurst II*").

Finally, nothing in the federal structure prohibits a State from voluntarily waiving its sovereign immunity from suit by private individuals either by explicitly consenting to such suits, *see Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985); *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 53-54 (1944); *Smith v. Reeves*, 178 U.S. 436, 441 (1900), or by accepting from Congress a gift or gratuity that is conditioned on such a waiver, *see College Savings Bank*, 527 U.S. at 686-87; *Atascadero*, 473 U.S. at 247; *Litman*, 186 F.3d at 550. But "[t]he test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Atascadero*, 473 U.S. at 241; *see also College Savings Bank*, 527 U.S. at 675; *Edelman*, 415 U.S. at 673; *Litman*, 186 F.3d at 550. Accordingly, a federal court may find a State to have waived its immunity from private suit in federal court only if the State directly and affirmatively waives its Eleventh Amendment immunity in a State constitutional provision or statute that explicitly "specif[ies] the State's intention to subject itself to suit." *Atascadero*, 473 U.S. at 241; *see also Litman*, 186 F.3d at 550; *Booth v. Maryland*, 112 F.3d 139, 145 (4th Cir. 1997). Similarly, a gift or gratuity from Congress, by itself, will effect a waiver of immunity by a recipient State only if Congress "manifest[s] a clear intent" to condition the gift or gratuity on the State's waiver of its constitutional immunity. *Atascadero*, 473 U.S. at 247; *see also Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("*Pennhurst I*"); *Litman*, 186 F.3d at 553-55 (holding that Congress clearly, unambiguously, and unequivocally conditioned a State's receipt of Title IX federal education funds on a State's waiver of its Eleventh Amendment immunity in actions brought in federal court under Title IX).

With these relevant principles in hand, we now address the two issues raised by the parties in this case: (1) whether the State of Maryland waived its sovereign immunity by participating in the administration of the Telecommunications Act of 1996, and

(2) whether the doctrine of *Ex parte Young* authorizes Bell Atlantic's suit against the individual State commissioners.

III. Waiver

Bell Atlantic's waiver argument relies on two provisions of the 1996 Act: 47 U.S.C. § 252(e)(5) and § 252(e)(6). Section 252(e)(5) clearly implies that a State commission need not make determinations under § 252. It provides:

> If a State commission fails to act to carry out its responsibility under this section [§ 252] in any proceeding or other matter under this section, then the [FCC] shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

Even though the Act commands State commissions to make determinations under § 252, *see, e.g.*, §§ 252(b)(4)(C), 252(c), 252(e)(1), 252(f)(3), subsection (e)(5) assumes that a State commission can refuse these commands, in which case the FCC must act in place of the State commission. It follows, therefore, that if a State commission elects *not* to make any § 252 determinations in the regulation of interconnection agreements, its determinations cannot be the subject of federal review under § 252(e)(6). That provision indeed reads:

> In a case in which a State fails to act as described in paragraph (5), the proceeding by the [FCC] under such paragraph and any judicial review of the [FCC's] actions shall be the exclusive remedies for a State commission's failure to act.

Bell Atlantic argues logically from these provisions that a State commission that elects to make § 252

determinations must, of necessity, also be electing to have its determinations reviewed by a federal court under § 252(e)(6), for that provision continues:

> In any case in which a State commission makes a determination under this section [§ 252], any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section [§ 252].

But it is a leap of logic to infer from this consent to federal-court review a consent by a State commission itself *to be made a party* to that federal review. Section 252(e)(6) provides for federal court review of State commission *determinations*, but it does not provide that the State commission thereby agrees to be named as a party in federal court or that it waives its Eleventh Amendment immunity. At most, such a conclusion would be implicit, and only then if it were a legal necessity that a State commission be sued in order to have its decision reviewed.

The parties do not agree whether a State commission is an indispensable party to a review of its determination. In a peculiar lineup of positions on this point, the State maintains that, although the State commission is not subject to suit, its participation in any review of a commission determination is indispensable, while Bell Atlantic suggests that this may not be so. Maryland law provides some support for Bell Atlantic's position, because under Maryland law, the Public Service Commission may, but need not, be a party to reviews of its decisions. *See* Md. Code Ann., Pub. Utils. Cos. § 3-204(d). In any event, the uncertainty surrounding the indispensable-party issue serves to underscore the weakness of Bell Atlantic's argument for waiver of Eleventh Amendment immunity. This argument requires two heroic assumptions: (1) that the authorization of review in § 252(e)(6) operates as a condition to State commission regulatory authority,

and (2) that a State would expect "review" necessarily to entail suit in which the State commission is named as a party.

This argument is strikingly reminiscent of, and arguably weaker than, the argument made by the injured employee in *Parden v. Terminal Ry. of the Ala. State Docks Dep't*, 377 U.S. 184 (1964), *overruled by College Savings Bank*, 527 U.S. 666. In *Parden*, the Supreme Court authorized the employee to bring an action under the Federal Employers' Liability Act ("FELA") against a railroad owned and operated in interstate commerce by the State of Alabama because the FELA subjected "every" railroad in interstate commerce to an employee negligence suit in federal court. The Court held:

> [B]y enacting the FELA . . . Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit.

Parden, 377 U.S. at 192. This is precisely the argument that Bell Atlantic makes to find waiver in this case.

But the principle on which Bell Atlantic's argument rests was expressly overruled last year (1999) in *College Savings Bank*, 527 U.S. at 680-83. In repudiating *Parden*'s constructive waiver doctrine, *College Savings Bank* emphasized that the doctrine did not square with the requirement that "a State's express waiver of sovereign immunity be unequivocal." 527 U.S. at 680. Indeed, the Court noted that "in the context of other constitutionally protected privileges," constructive waivers are "simply unheard of." *Id.* at 681. Stated otherwise, Congress cannot extract a constructive waiver from a State without "having plainly stated its intention that participation by a state

in the regulated activity would be deemed an implied waiver of immunity." *Abril v. Virginia*, 145 F.3d 182, 189 n.13 (4th Cir. 1998) (citing *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 478 (1987) (plurality opinion)). These principles follow from the deeply rooted stricture that the decision to waive sovereign immunity must be "altogether voluntary on the part of the sovereignty." *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858).

In *College Savings Bank*, the Court distinguished a *Parden*-style, constructive waiver from circumstances in which a State may implicitly waive its sovereign immunity by accepting from Congress a "gift" or a "gratuity," the receipt of which is made conditional on the State's waiver of immunity. *See* 527 U.S. at 686-87 (citing *South Dakota v. Dole*, 483 U.S. 203 (1987), and *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959)). The Court's distinction was based on the fact that, in *Parden*, if the State wished to preserve its immunity in the face of the FELA, it would be required to forsake the otherwise *legal* activity of running a railroad, whereas under *Dole* and *Petty*, the State could preserve its immunity simply by turning down the gift or gratuity, something to which it was not otherwise legally entitled. The Court acknowledged that the distinction between forswearing a gift and garnering a sanction would disappear, for example, if Congress conditioned the receipt of funds so substantial that a State was, in effect, compelled to accept them. *See* 527 U.S. at 687. The Court indicated, however, that at least with respect to funding legislation, it could well be beyond Congress' power to offer such a choice under the "coercion" limitation to Congress's Spending Clause power articulated in *Dole*. *See id.* (citing *Dole*, 483 U.S. at 211); *see also Litman*, 186 F.3d at 553.

Regardless of whether there is a categorical limitation on Congress' power to condition a State's receipt of a gift or gratuity on a waiver of immunity, it is certain that a congressional gift in the form of federal

funds will not validly waive a recipient State's Eleventh Amendment immunity unless Congress "manifest[s] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity." *Atascadero*, 473 U.S. at 247. Congress' grant to States of conditional funds is "in the nature of a contract," the legitimacy of which "rests on whether the State voluntarily and knowingly accepts the terms." *Pennhurst I*, 451 U.S. at 17 ("There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it"). By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their acceptance from Congress of a gift or gratuity.

If Congress is not unmistakably clear and unequivocal in its intent to condition a gift or gratuity on a State's waiver of its sovereign immunity, we cannot presume that a State, by accepting Congress' proffer, knowingly and voluntarily assented to such a condition. This requirement insures that all branches of the federal government respect the constitutional stature of Eleventh Amendment immunity and accord State sovereign immunity the protection of other constitutional rights, which will not be waived absent the "intentional relinquishment or abandonment of a known right or privilege." *College Savings Bank*, 527 U.S. 681-82 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

We have examined the Telecommunications Act of 1996 for a clear statement of congressional intent to condition participation in the regulation of telecommunications on a State's waiver of sovereign immunity, knowing that Congress knows well how to express such an intent and has done so in the context of numerous civil rights statutes. Although passed under Congress' Spending Clause power, the Rehabilitation Act offers an example. *See Litman*, 186 F.3d at 553-54. That act

states outright that a State "shall not be immune under the Eleventh Amendment . . . from suit in Federal court" for a violation of the act's anti-discrimination edict. 42 U.S.C. § 2000d-7(a)(1). We readily concluded in *Litman* that any State reading that provision would clearly understand that, by accepting Title IX funding, it was consenting to resolve disputes regarding alleged violations of the Act's anti-discrimination provisions in federal court. *See* 186 F.3d at 554.

By contrast, an examination of the language of § 252(e)(6) leads to the inexorable conclusion that Congress did not clearly manifest an intent—if it had such an intent at all—to condition State utility commissions' participation in the regulation of interconnection agreements on a waiver of sovereign immunity from private suit. That section provides nothing of the kind. It states:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court.

47 U.S.C. § 252(e)(6). This section simply provides for review of certain State commission determinations in federal court. A State official reading this provision would have no indication that the State commission, if it chose to make the reviewable determination, would be compelled to appear in federal court at the behest of an aggrieved telecommunications company. Even assuming Congress conferred a gift on State utility commissions by allowing them to participate in the regulation of telecommunications—a gift that is difficult to discern[3]—the language of § 252(e)(6) simply

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[3] The district court noted that the Act "stripped the states of local power to regulate telecommunications that had been vested in them for decades," and remarked, "Some gift." *Cf.* Virgil, *Aeneid*, bk. II, l. 49 ("Whatever it is, I fear Greeks even when they bear gifts" (reporting the comments of the Trojan priest Laocoon upon seeing the large wooden

falls short when examined under our "stringent" tests for determining whether a State has waived its immunity from federal court jurisdiction. *See Atascadero*, 473 U.S. at 241, 246-47 (finding that § 505 of the Rehabil-itation Act, which provides for suits in federal court against "any recipient of Federal assistance" fell "far short of manifesting a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity"); *but see AT&T Communications v. BellSouth Telecomms.*, ___ F.3d ___, 2001 WL 38281, at *9 (finding waiver of Eleventh Amendment immunity from suits brought under § 252); *MCI Telecomms. v. Illinois Bell*, 222 F.3d at 342-44 (same); *MCI Telecomms. Corp. v. Public Serv. Comm'n of Utah*, 216 F.3d 929, 938-39 (10th Cir. 2000) (same).

Bell Atlantic and the United States argue insistently that the State of Maryland has no inherent right to partake in any role administering the scheme of the 1996 Act. They contend that the State had a clear choice—laid out in § 252(e)(5)—either to participate in the regulation of interconnection agreements or to forego such a role and allow the FCC to act in its stead. This argument, however, misses the mark. The implication of exercising the choice given in § 252(e)(5) is to have a State commission's decisions reviewed in federal court, *not to waive the State's sovereign immunity and subject the State commission itself to suit in federal court*. "[W]e require an unequivocal indication that [a] State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment." *Atascadero*, 473 U.S. at 238 n.1. As the Court confirmed in *College Savings Bank*, "there is little reason to assume actual consent based upon the State's mere presence in a field subject to congressional regulation." 527 U.S. at 680.

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horse left by the Greeks as a "gift" to the city of Troy)).

Bell Atlantic's arguments that the preempted or "preemptable" nature of the telecommunications field somehow alters our inquiry into whether the State of Maryland waived its Eleventh Amendment immunity also lack merit. Congress may not subject States to suit in federal court merely by partially or fully preempting the regulation of a field under its commerce power. If we were so to find, we would have to ignore the holding of *Seminole Tribe* that Congress does not possess the power to abrogate a State's Eleventh Amendment immunity under its Article I powers. *See* 517 U.S. at 72-73. It is not enough that a State's waiver of immunity is convenient to the 1996 Act's regulatory scheme or practical for the development of a uniform body of law under the 1996 Act. Our clear-statement inquiry is invariable, and we have searched in vain for any statement of congressional intent to condition a State utility commission's participation in the 1996 Act's regulatory scheme on the waiver of its constitutionally predicated sovereign immunity.

IV. *Ex Parte Young*

Bell Atlantic and the United States maintain that, in any event, Maryland's sovereign immunity does not bar an action against the State commissioners in their official capacity to enjoin ongoing violations of federal law under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). They seek to draw upon this "limited exception to the Eleventh Amendment immunity for the limited purpose of declaring and enjoining relief to redress the Public Service Commission's violation of federal law in misconstruing the 1996 Act." They maintain that the State commission's decision allowing reciprocal compensation for local telephone calls to Internet service providers violates the federal understanding of the Telecommunications Act, as manifested in the 1999 FCC Ruling, which, subsequent to briefing in this case, was vacated and remanded by the District of Columbia Court of Appeals to the FCC for further consideration.

The Maryland State officials argue that when Congress has provided a detailed remedial scheme for enforcement of federal law against State interests, the doctrine of *Ex parte Young* should not be applied to traverse the limits of that federal scheme. They assert that if the doctrine of *Ex parte Young* were applied to subject them to suits by private citizens to enforce the Telecommunications Act, they "would be exposed to a more severe action than anticipated by § 252(e)(6). . . . Section 252(e)(6) only allows for a review of an interconnection agreement whereas an *Ex parte Young* action against a State commission would expose the Commissioners to the full remedial powers of a federal court, including presumably, contempt sanctions." These State commissioners also note that § 252(e)(6) refers only to actions involving determinations by the State commission itself, not by its individual commissioners.[4]

The district court agreed with the State commissioners' position. It read the 1996 Act as manifesting Congress' intent to authorize actions against the State commissions, as distinct from individual State commissioners.

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[4] We note that the Telecommunications Act defines "State commission" to mean "the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers." 47 U.S.C. § 153(41). Under Maryland law, both general power and supervisory and regulatory power over public service companies is conferred on "the Public Service Commission." Md. Code Ann., Pub. Utils. Cos. §§ 2-101, 2-112, 2-113. When the Public Service Commission enforces its orders, it does so in the Commission's name, *see id.* § 2-117(a), and when a regulation of the Commission is challenged, the Commission in its name must be made a party, *see id.* § 3-201(b). Finally, in any proceeding seeking judicial review of the Maryland Public Service Commission, the Commission may participate as a party. *See id.* § 3-204(d). Nowhere under the State public utilities law is regulatory power conferred upon an individual commissioner and nowhere is an individual commissioner made subject to suit for the Public Service Commission's regulatory actions.

In approaching the question of whether the doctrine of *Ex parte Young* permits Bell Atlantic's suit against State commissioners, we begin with the recognition that the scope of interests that *Ex parte Young* protects in preventing violations of federal law must be carefully circumscribed so as not unduly to erode the important underlying doctrine of sovereign immunity. *See Coeur d'Alene Tribe*, 521 U.S. at 269-70. Thus, just because a private citizen's federal suit seeks declaratory injunctive relief against State officials does not mean that it must automatically be allowed to proceed under an exception to the Eleventh Amendment protection. Such "empty formalism" would improperly sacrifice the "real interests served by the Eleventh Amendment." *Id.* at 270. In *Coeur d'Alene Tribe*, a federally recognized Indian tribe and tribe members sued the State of Idaho and State officials over the right to submerged lands in Idaho. The court held that even though this suit was for declaratory and injunctive relief against State officials, the *Ex parte Young* doctrine did not authorize the suit:

> It is apparent, then, if the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury. Under these particular and special circumstances, we find the *Young* exception inapplicable. The dignity and status of its statehood allow Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case.

Id. at 287-88. This holding reflects a considered evaluation of the degree to which a State's sovereign interest would be adversely affected by a federal suit seeking injunctive relief against State officials.

This case-by-case approach to application of the *Ex parte Young* doctrine is exemplified further by the Supreme Court's earlier holding in *Seminole Tribe*,

where the court also refused to apply *Ex parte Young* in circumstances where to do so would alter the remedial scheme selected by Congress to enforce federal law.

> Therefore, where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*.

Seminole Tribe, 517 U.S. at 74.

Accordingly, to determine whether *Ex parte Young* authorizes this suit against State officials, we must evaluate the federal interests served by permitting a federal suit against individual members of the Maryland Public Service Commission, taking into account the remedial scheme for enforcement of federal law that Congress has established in the Telecommunications Act of 1996. Then, with those federal interests understood, we must determine whether the federal suit would unduly sacrifice the important value of Maryland's sovereign immunity.

The federal interest furthered by the 1996 Act is to have § 252 determinations made by State commissions reviewed in federal court. Explicitly, the 1996 Act authorizes the party "aggrieved" by a *State commission* determination to file a suit in federal court "to determine whether [an interconnection] agreement . . . meets the requirements of section 251 and [section 252]." 47 U.S.C. § 252(e)(6). No interest is manifested by the 1996 Act to discipline individual State officials or to expose them to any liability. The limit of the stated interest is the "review" of certain State commission decisions. And under Maryland law, it is not necessary for the State commission, much less the individual commissioners, to be a party to an appeal for State- court review of its determinations. *See* Md. Code Ann., Pub. Utils. Cos. § 3-204(d). We may fairly conclude that the 1996 Act's interest is in federal review,

and no more, and this interest would not be frustrated if we were to preserve the Eleventh Amendment immunity of State officials with respect to such suits.

Moreover, in this case, it is not altogether clear that Bell Atlantic's action is designed to prevent an ongoing violation of federal law, a requirement that "[t]he Supreme Court has not shown a propensity to relax." *Booth*, 112 F.3d at 142 (citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 89 (1989); *Papasan v. Allain*, 478 U.S. 265, 277-78 (1986); and *Green*, 474 U.S. at 68). The dispute between Bell Atlantic and MCI required the State commission to construe the parties' voluntarily negotiated interconnection agreement. In interpreting this agreement, the Maryland Public Service Commission found that Bell Atlantic and MCI intended to treat ISP-bound telephone calls as local traffic for the purposes of paying reciprocal compensation. For this determination to constitute an ongoing violation of federal law—and thus to provide a basis for a suit against the commissioners under the doctrine of *Ex parte Young*—the agreement of the parties, as interpreted and enforced by the commission, would have to be inconsistent with federal law. *See Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (holding that judicial enforcement of racially discriminatory private agreements constitutes State action in violation of the Equal Protection Clause of the Fourteenth Amendment). Bell Atlantic contends that the FCC ruling (now vacated) provides grounds for its assertion that its agreement with MCI is inconsistent with federal law, and the enforcement of the agreement amounts to an ongoing violation of federal law. This position is questionable.

The now-vacated FCC Ruling did indeed classify local calls to Internet service providers as "jurisdictionally mixed" and concluded that they "appear[] to be largely interstate." FCC Ruling, 14 FCC Rcd at 3690 (¶ 1), *vacated, Bell Atl. Tel. Cos.*, 206 F.3d 1. But far from interpreting the Telecommunications Act as prohibiting agreements to pay reciprocal compensation

for such calls, the FCC Ruling emphasized that "[t]his conclusion, however, does not in itself determine whether reciprocal compensation is due in any particular instance." *Id.* The FCC advised that "[i]n the absence, to date, of a federal rule regarding the appropriate inter-carrier compensation for this traffic, we . . . conclude that parties should be bound by their existing interconnection agreements, as interpreted by state commissions." *Id.* Later in its ruling, the FCC emphasized that "parties may voluntarily include this traffic within the scope of their interconnection agreements under sections 251 and 252 of the Act, even if these statutory provisions do not apply as a matter of law." *Id.* at 3703 (¶ 22). The FCC identified several factors that could inform a State commission's determination of whether parties to interconnection agreements agreed to pay reciprocal compensation for ISP-bound traffic, emphasizing that the factors "are illustrative only," and that "state commissions, not this Commission [the FCC], are the arbiters of what factors are relevant in ascertaining the parties' intentions." *Id.* at 3704 (¶ 24). It is hard to conceive how the Public Service Commission can be said to have perpetrated an ongoing violation of federal law by following the dictates of the federal agency authorized to implement that law, especially when the charging party relies on the federal agency's interpretation as authoritative.

The 1996 Act also furnishes little basis for concluding that an interconnection agreement providing for the payment of reciprocal compensation for the termination of ISP-bound calls is inconsistent with the requirements of federal law. Section 251(b) states simply that "[e]ach local exchange carrier has . . . [t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). Although § 251(b)(5) thus purports to extend the duty of reciprocal compensation to all "telecommunications," the FCC's implementing regulations interpret the requirement as limited to "local telecommunications traffic." 47 C.F.R.

§ 51.701(a) ("The provisions of this subpart apply to reciprocal compensation for transport and termination of local telecommunications traffic between LECs and other telecommunications carriers"); *see also Bell Atl. Tel. Cos.*, 206 F.3d at 4.

Bell Atlantic argues that, in its interconnection agreement with MCI, the parties agreed to incorporate emerging standards of federal law, such that their reciprocal compensation obligations were subject to change if prevailing federal definitions of local and interstate traffic changed. It is a question of State law, however, whether the interconnection agreement at issue in this case includes a dynamic incorporation of statutory interpretation, including the definition of which calls constitute local calls subject to reciprocal compensation. It would not appear that the Maryland Public Service Commission could be charged with perpetrating an ongoing violation of federal law by virtue of its resolution of this matter of State contract law. The State commission construed the interconnection agreement at issue in this case in accordance with its conclusions about the parties' intent on the issue of how to classify ISP-bound calls. The State commission made quite clear that this was a matter of contract interpretation, citing *Denice v. Spotswood I. Quinby, Inc.*, 237 A.2d 4, 7 (Md. 1968), for the proposition that "unless a contract provides otherwise, the law applicable at the time and place the contract is entered into is to be considered a part of that contract." The State commission found no indication in the contract that the parties wished to incorporate evolving federal standards into their agreement, finding instead that Bell Atlantic agreed to treat ISP-bound calls as local, in conformance with the then-prevailing regulatory interpretation and industry custom.

In short, it does not appear that Bell Atlantic can allege an ongoing violation of federal law when the State commission determines as a matter of State contract law that the parties agreed to treat ISP-bound calls as

local for purposes of reciprocal compensation. Certainly this conclusion does not violate the § 251(b)(5) mandate that carriers establish reciprocal compensation arrangements. And the (now-vacated) FCC ruling, on which Bell Atlantic relies to assert an ongoing violation of federal law, explicitly allows for a result of the kind reached by the State commission in this case. If at a later date, the FCC should establish an appropriate interstate compensation mechanism for ISP-bound traffic and should forbid local carriers from agreeing to treat these calls as local for purposes of reciprocal compensation, we fully expect that the Maryland State Public Service Commission would follow through with its stated intent under those circumstances to revisit its determination. Indeed, it stated in its decision that its determination would "only apply until the FCC issues an order creating its inter-carrier compensation mechanism for ISP-bound traffic."

In addition to the doubts we have about whether any significant federal interest counsels the naming of State commissioners as parties to an action reviewing their decision as a body and whether the determination made by the State commission amounts to a violation of federal law, it appears that Congress believed that the federal interest would be adequately served by the limited federal court review prescribed by 47 U.S.C. § 252(e)(6) and the State-court review indicated otherwise by the 1996 Act. See our discussion in Part IV, below.

Section 252(e)(6) invokes federal court review only for State commission determinations made under § 252 to determine whether interconnection agreements are in compliance with §§ 251 and 252. *See* 47 U.S.C. § 252(e)(6). If, however, we were to permit an *Ex parte Young* action to proceed against State officers, presumably to answer to a federal court injunction and potentially to face sanctions for non-compliance with that injunction, we would be supplementing the narrowly defined federal court review selected by

Congress. The Supreme Court in *Seminole Tribe* instructs that this is not to be done under the guise of *Ex parte Young*: "[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon Ex parte Young." 517 U.S. at 74.

In sum, when evaluating the federal interests that would be served by a suit against the individual members of the Maryland Public Service Commission, we conclude that (1) the State commissioners are probably not indispensable parties to federal review of the State commission's determinations; (2) in any suit against State commissioners, it is more likely that State-contract-law, rather than federal-law, violations would be redressed; and (3) a federal court action against State commissioners of this type would improperly expand the federal remedy selected by Congress.

Against these dubious federal interests, we weigh the serious offense to the dignity of a State's quasi-judicial body. The Maryland Public Service Commission acts as a court, and its decisions are reviewable as a court in higher courts. In this case, there is no suggestion that the State commission and the individual State commissioners did not strictly act within the scope of the authority conferred on them both by federal and State law. They disposed of the matter before them conscientiously and issued separate decisions to explain and support their split judgment.

To bring these State officers before a federal court to answer to the assertion of a private citizen that in acting within the scope of their authority, they made the wrong decision would be an affront to the sovereignty of the State of Maryland and would undermine the mutual respect that characterizes the relationship between the federal and State sovereigns. It would be difficult to conceive of a more central challenge to sovereign immunity, which is protected generally in

federal court by the Eleventh Amendment. Accordingly, in the specific circumstances of this case, we conclude that *Ex parte Young* does not authorize suit against the individual members of the Maryland Public Service Commission. *But see AT&T Communications v. BellSouth Telecomms.*, ___ F.3d ___, 2001 WL 38281, at *11 (concluding that suits challenging state commission interpretations of interconnection agreements are "straightforward" *Ex parte Young* cases); *MCI Telecomms. v. Illinois Bell*, 222 F.3d at 345 (same); *MCI Telecomms. v. Public Serv. Comm'n of Utah*, 216 F.3d at 939-40 (same); *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir. 2000) (same).

V. Jurisdiction under the 1996 Act

The Eleventh Amendment decisions thus reached preserve the sovereign immunity of the State of Maryland and its officials acting in their official capacity and bar Bell Atlantic's action against them in federal court. The private telecommunications carriers, however, do not enjoy sovereign immunity. But applicable to them, the State, as an alternative defense, challenged the federal courts' subject matter jurisdiction, an issue that must be decided as to the action against the private carriers even though they do not themselves challenge subject matter jurisdiction. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (appellate courts have a "special obligation" to evaluate subject matter jurisdiction); *Plyler v. Moore*, 129 F.3d 728, 731 n.6 (4th Cir. 1997) (subject matter jurisdiction must be considered whenever raised or even *sua sponte*).

The State contends that the district court lacked subject matter jurisdiction over "enforcement decisions rendered by State commissions" and that therefore this action should have been dismissed. It argues that the plain language of 47 U.S.C. § 252(e)(6) in the 1996 Act grants jurisdiction to federal district courts only to review "determinations" made under § 252 and that

such review is for the limited purpose of ascertaining whether an interconnection agreement complies with 47 U.S.C. §§ 251 and 252. It asserts that the language of § 252(e)(6) does not authorize federal review of State commission orders *enforcing* an approved interconnection agreement on the complaint of a party that the agreement has been breached. It maintains that the 1996 Act leaves jurisdiction for judicial review of such enforcement actions with State courts and that the Act "did not intend to totally divest State courts of jurisdiction." Indeed, it notes that this allocation of authority is not cause for consternation because State courts have inherent authority to adjudicate claims even if they arise under the laws of the United States.

Bell Atlantic argues that the enforcement of interconnection agreements that State commissions have approved as part of their responsibilities under § 252 falls within State commissions' "plenary authority." It asserts that other circuits have adopted that position, as has the FCC. *See, e.g., Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 804 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); *Illinois Bell Tel. Co. v. Worldcom Techs., Inc.*, 179 F.3d 566, 570-71 (7th Cir. 1999); FCC Ruling, 14 FCC Rcd at 3703 (¶ 22) (1999) (agreements under §§ 251 and 252 are "interpreted and enforced by the state commissions"), *vacated, Bell Atl. Tel. Cos.*, 206 F.3d 1. Bell Atlantic reasons that because a State commission has implied authority under § 252 to interpret and enforce agreements it approves under § 252, any decision interpreting or enforcing the terms of an interconnection agreement is therefore a "determination" under § 252 that is reviewable in federal court under § 252(e)(6). *See* 47 U.S.C. § 252(e)(6) (providing federal review of State commission "determinations" made under § 252).

MCI also contends that federal courts have jurisdiction over this dispute. It argues that § 252(e)(6) must be read "in context and in light of the [1996] Act's

structure and purpose," and that when so read, the federal jurisdiction provision does not limit review only to State commission decisions approving interconnection agreements. Rather, MCI asserts, it must be read more broadly to grant federal courts responsibility for assuring that interconnection agreements are interpreted in compliance with federal law. In contrast to Bell Atlantic, however, MCI asserts that "[t]he Act leaves resolution of state law claims to state courts," so § 252(e)(6) does not permit a federal court to review a State commission's enforcement action for compliance with State law.

To determine the proper scope of 47 U.S.C. § 252(e)(6), which confers jurisdiction on federal courts to review only *some* State commission determinations, it is necessary to understand the overall structure and purpose of the Act. This is because the 1996 Act creates a patchwork of federal and State responsibilities to manage the intended transition from the regulation of telecommunications monopolies to unregulated competition and because the establishment of such a patchwork regime appears to have been a deliberate decision on the part of Congress as a means of preserving State regulatory structures to assist in managing the transition.

A

Under the Federal Communications Act of 1934, telephone service was treated as a natural monopoly, and regulatory responsibility was divided between the FCC, which regulated interstate, long-distance service, and State public service commissions, which regulated intra-state service. *See, e.g.*, 47 U.S.C. § 152(a), (b); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986). Indeed, 47 U.S.C. § 410 created a joint federal-state board to resolve regulatory jurisdictional disputes. Without reviewing here the involved history of telecommunications regulation since the enactment of the 1934 Act, it is sufficient to observe that the 1996

Act did not supplant the 1934 Act, and importantly, it did not repeal 47 U.S.C. §§ 152 and 410. Rather, the 1996 Act amended the 1934 Act, leaving much of the 1934 Act's structure in place. In amending the 1934 Act with the 1996 Act, however, Congress appears to have abandoned its hands-off approach to intrastate commerce and undertaken to impose competition in both the interstate and intrastate arenas. In addition, Congress sought to facilitate the convergence of technologies in telephone service, broadcast (radio and TV) service, cable service, satellite service, and other miscellaneous transmission services. But Congress left in place many of the traditional functions of State public utility commissions. At bottom, by enacting the Telecommunications Act of 1996, Congress intended "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56, 56 (1996).

By merely amending the 1934 Act and by continuing to employ the resources and expertise of State public service commissions, Congress manifested an intent not to raze the pre-1996 statutory landscape and build an entirely new statutory system. Rather, the 1996 Act partially flooded the existing statutory landscape with specific preempting federal requirements, deliberately leaving numerous islands of State responsibility. With respect to some of these State islands, the Act mandates that State commissions apply federal law within their existing State procedural structures. Thus, for example, State commissions are required to apply federal requirements in arbitrating and approving interconnection agreements. *See* 47 U.S.C. § 252(c), (e). With respect to other State islands, the Act actually conscripts State governmental agencies for federal purposes. *See, e.g.*, 47 U.S.C. § 251(f) (mandating that State commissions conduct inquiries for the purpose of terminating rural telephone company

exemptions); 47 U.S.C. § 332(c)(7) (requiring local zoning boards to apply federal procedural standards in approving the siting of telecommunications towers and facilities).[5] Still other areas of pre-1996 State interests are completely inundated by federal preemption, such as in the area of satellite service. *See, e.g.*, 47 U.S.C. § 303(v). In some instances, preemption in the Act is deferred and conditional, to be effected on a case-by-case approach. *See, e.g.*, 47 U.S.C. § 252(e)(5) (directing the FCC to issue order "preempting the State commission's jurisdiction" of a proceeding if the State commission "fails to act to carry out its responsibility"); 47 U.S.C. § 253(d) (directing the FCC to "preempt the enforcement" of any State statute or regulation that has the effect of denying a carrier the ability to provide any interstate or intrastate telecommunications service).

No generalization can therefore be made about where, as between federal and State agencies, responsibility lies for decisions. The areas of responsibility are a patchwork and the dividing lines are sometimes murky, prompting one authority to observe:

> In a mandatory if pro-forma gesture to the states, the Act declares that it does not implicitly preempt any state or local law. In 280 plus pages of text, however, implicit repeals are hardly needed. There is plenty of explicit language to construe, and abundant ambiguity about just who's in charge, on which issues. The new legislation's division of legal authority between federal and state regulators will likely be litigated for many years to come.

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[5] While the State of Maryland hinted in its brief that this aspect of the 1996 Act violates the Tenth Amendment and stated at oral argument that it regretted not having argued this point explicitly, whether these conscriptions of State agencies violate the Tenth Amendment is not before us. *Cf. Petersburg Cellular Partnership v. Board of Supervisors of Nottoway County*, 205 F.3d 688, 699-705 (4th Cir. 2000) (opinion of Niemeyer, J.).

Peter W. Huber, Michael K. Kellogg & John Thorne, *The Telecommunications Act of 1996* § 1.2.12 (1996). What is certain is that Congress intended to divide responsibility, and unless it *expressly* provided for federal responsibility, it left pre-1996 Act assignments of responsibility in place, such as by retaining §§ 152 and 410. In § 601(c)(1) of the 1996 Act, Congress makes this point explicit:

> This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law *unless expressly so provided* in such Act or amendments.

Pub. L. No. 104-104, 110 Stat. 56, 143 (1996) (codified at 47 U.S.C. § 152 note) (emphasis added).

For purposes of determining whether the Act assigns federal courts or State courts the task of reviewing State commission determinations, § 601(c) is consistent with well-established principles for defining federal jurisdiction and therefore is particularly apt. Because federal courts are courts of limited jurisdiction, when their jurisdiction is created by statute, the statute is strictly construed. *See Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8, 11 (1799) (observing that because federal courts are courts of limited jurisdiction, "the fair presumption is . . . that a cause is without its jurisdiction till the contrary appears").

Thus, determinations by *State* commissions that are not expressly designated for review in federal court are left for review by State courts, as provided by the existing law of the State that created the State commission. The structure in Maryland is typical. The Public Service Commission, consisting of five commissioners, *see* Md. Code Ann., Pub. Util. Cos. § 2-102(a), is given broad and general powers to supervise and regulate all public service companies operating within the State, *see id.* § 2-113. This authority includes the power to adjudicate complaints seeking to "enforce compliance with the requirements of law by public service

companies." *Id.* § 2-113(a)(ii); *see also id.* § 3-102 (authorizing the filing of complaints before the commission). Any "party or person" who is "dissatisfied" with any final decision or order of the Public Service Commission may seek judicial review in the State circuit court for the county where the public service company operates or in the Circuit Court for Baltimore City. *See id.* §§ 3-202(a), 3-204(a). Maryland law authorizes, but does not require, the Public Service Commission to be a party to any such appeal. *See id.* § 3-204(d). Of course, once in court, the parties are entitled to further review by the Maryland Court of Special Appeals. They also may seek review from the Maryland Court of Appeals and the Supreme Court of the United States.

B

Against this general background of the 1996 Act and its patchwork of federal and State responsibility, we now turn to 47 U.S.C. §§ 251 and 252, which govern whether actions to review State commission determinations on the *enforcement*, as distinct from *approval* or *rejection*, of interconnection agreements for local service are to be routed to federal courts or left to State courts.

Section 252(e)(6) of Title 47 provides in relevant part:

> In any case in which a State commission makes a determination under this section [§ 252], any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the [interconnection] agreement . . . meets the requirements of section 251 and this section [§ 252].

Because it is clear that this section provides for direct federal court review of State commission "determination[s]" made "under this section [§ 252]," we need only identify what determinations a state commission is

authorized to make under § 252 to ascertain the scope of federal jurisdiction. Determinations made pursuant to authority other than that conferred by § 252 are, by operation of § 601(c) of the 1996 Act, left for review by State courts. *See* 47 U.S.C. § 152 note.

Section 251 of Title 47 lifts monopolistic barriers against insurgent or competing telecommunications carriers by mandating interconnection agreements among carriers and by imposing a duty on carriers to agree to terms that promote seamless service to consumers. Section 251 also directs the FCC to promulgate regulations to implement the section, at the same time commanding it to preserve State regulations that are consistent with § 251. *See* 47 U.S.C. § 251(d)(3).

Section 252, entitled "Procedures for negotiation, arbitration, and approval of agreements," creates the procedural framework for implementing the commands of § 251. Section 252 defines two separate courses leading to the formation of interconnection agreements—one by negotiation (including mediation) and the other by compulsory arbitration. Agreements arrived at through negotiation must be submitted to the appropriate State commission, which "shall approve or reject the agreement, with written findings as to any deficiencies." 47 U.S.C. § 252(e)(1); *see* 47 U.S.C. § 252(a). But the State commission may only reject a *negotiated* agreement if it finds either that (1) the agreement discriminates against a nonparty telecommunications carrier or that (2) the agreement "is not consistent with the public interest, convenience, and necessity." 47 U.S.C. § 252(e)(2)(A). Section 252(e) also permits State commissions to impose State-law requirements in its review of interconnection agreements. *See* 47 U.S.C. § 252(e)(3). Any party "aggrieved" by the State commission's determination approving or rejecting a negotiated agreement may "bring an action in an appropriate Federal district court" to test the agreement against the requirements of §§ 251 and 252. 47 U.S.C. § 252(e)(6). And § 252(e)(4) makes

this limited federal review exclusive, stating that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section [§ 252]."

If an agreement cannot be reached through negotiation or mediation under § 252(a), a party may petition the State commission for compulsory arbitration, setting forth the specific issues upon which agreement cannot be reached. The State commission is directed to arbitrate and resolve the disputed issues, including those raised in the response to the arbitration petition. *See* 47 U.S.C. § 252(b)(4). In conducting the arbitration, the State commission is required (1) to ensure compliance with § 251, (2) to establish rates for interconnecting services, and (3) to provide a schedule for implementation of the interconnection agreement. *See* 47 U.S.C. § 252(c). Once the disputed issues are thus resolved through compulsory arbitration, the entire agreement is submitted to the State commission for approval or rejection. But unlike an agreement reached through *negotiation*, where the grounds for rejection by the State commission are limited to discrimination and inconsistency with the public interest, convenience, and necessity, an *arbitrated* agreement is reviewed by the State commission for compliance with the more comprehensive requirements of § 251 (establishing multiple interconnection requirements) and § 252(d) (establishing pricing standards). Finally, as with the State commission's determination approving or rejecting a negotiated agreement, any party "aggrieved" by the State commission's determination approving or rejecting an arbitrated agreement may bring an action in an appropriate federal district court, again "to determine whether the agreement . . . meets the requirements" of §§ 251 and 252. 47 U.S.C. § 252(e)(6).

In short, § 252(e)(6) confers jurisdiction on federal courts to review State commission "determinations" made under § 252 "to determine whether the agreement . . . meets the requirements of section 251 and

this section [252]." While this federal jurisdictional provision authorizes review of § 252 arbitration determinations ultimately leading to the formation of interconnection agreements, in the final analysis, the State commission determinations under § 252 involve only approval or rejection of such agreements.[6] With respect to negotiated agreements in particular, the federal review is narrower. The *only* "determination" that can be made by the State commission under § 252 on a negotiated agreement is a determination to approve or reject it, and when the agreement is approved by the State commission, then there is a question whether there can be any "party aggrieved" to seek review in federal court.

With respect to any determination made by a State commission that is not a § 252 determination, judicial review is left for review as specified by State law for review of State commission actions. Again, this conclusion is confirmed by § 601(c)(1) of the 1996 Act, which states that the Act is not to be construed "to modify, impair or supersede . . . state, or local law *unless expressly so provided* in [the 1996 Act]," 47 U.S.C. § 152 note (emphasis added), and by the general principle

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[6] We note that the FCC recently ruled that the Virginia State Corporation Commission, by declining jurisdiction to interpret or enforce an existing interconnection agreement, had "fail[ed] to carry out its responsibility under [§ 252]," which, under § 252(e)(5), directs the FCC to preempt the jurisdiction of the State commission to act in that proceeding. *See In the Matter of Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, Memorandum Opinion and Order, FCC 00-216, CC Docket No. 00-52 (June 14, 2000) ("*Starpower Communications*"). Because Starpower Communications interprets the meaning of State commission "responsibilities" under § 252 in the context of a State commission's failure to take action, rather than in the context of State commission "determinations" which are reviewable in federal court under § 252(e)(6), we find that this ruling does not bear on this case. Federal court jurisdiction to review State commissions could reasonably be interpreted to be more narrow in scope than the FCC's duty to act in place of a State commission that failed to act.

that we should not infer a grant of federal jurisdiction unless Congress manifests its intent to confer jurisdiction.

In this case, an interconnection agreement was voluntarily negotiated and reached between Bell Atlantic and MCI. The agreement was submitted to the Maryland Public Service Commission, which approved the agreement, and no party challenged that approval. It would appear therefore that there has been no § 252 "determination" left for review in the federal courts by virtue of § 252(e)(6). The only "determination" that the State commission made under § 252 was to approve the agreement and no party now seeks to review that determination; indeed, no party was thereby aggrieved.

Only after the agreement was negotiated and approved did MCI file a complaint with the Maryland Public Service Commission, taking the position that telephone calls made to local exchanges for connection to the Internet were local calls subject to reciprocal compensation under the terms of MCI's interconnection agreement with Bell Atlantic. *See* 47 U.S.C. § 251(b)(5) (imposing duty of reciprocal compensation on telecommunications carriers); 47 C.F.R. § 51.711 (elaborating on the duty of reciprocal compensation). That ISP-bound calls were subject to reciprocal compensation was also a position maintained by more than 30 State public service commissions across the country. Bell Atlantic, however, argued logically that a telephone call initiated to an ISP, even though through a local exchange, was nevertheless an interstate call because it did not "terminate" locally. Therefore, it argued, under its interconnection agreement with MCI, such calls were not subject to reciprocal compensation. The Maryland Public Service Commission, however, ruled against Bell Atlantic, and Bell Atlantic appealed the State commission's decision to the Circuit Court for Montgomery County, Maryland. The State court affirmed the commission's decision, and no further appeal was taken.

In ruling against Bell Atlantic, the Maryland Public Service Commission noted that if the FCC were to issue a ruling that declared calls to Internet service providers to be interstate calls, it would revisit its decision. The FCC did thereafter declare that ISP-bound traffic was interstate, not local, traffic, and therefore that such calls were not subject to reciprocal compensation, as provided for in 47 U.S.C. § 251(b)(5). *See* FCC Ruling, 14 FCC Rcd 3689, *vacated*, *Bell Atl. Tel. Cos.*, 206 F.3d 1. Within a week of the FCC's ruling, Bell Atlantic returned to the Maryland Public Service Commission, requesting that it review its earlier decision in light of the FCC's ruling. By a vote of three to two, the Maryland Public Service Commission again rejected Bell Atlantic's position, asserting State authority to decide whether the parties had agreed in their interconnection agreement to treat ISP-bound traffic as local and stating that in any event the commission had authority to require reciprocal compensation even if the parties did not so agree. It reasoned that because ISP-bound calls were treated as local traffic when the parties reached agreement, it was their intent to continue to treat them that way in the agreement. Following this decision by the Public Service Commission, Bell Atlantic sought review in federal court, invoking as the basis for its jurisdiction § 251(e)(6), as well as 28 U.S.C. § 1331 (general federal-question jurisdiction).

Bell Atlantic argues vigorously that State commissions have authority to interpret and enforce interconnection agreements that they approve under § 252. It maintains that this authority falls within State commissions' plenary authority, citing *Iowa Utils. Bd. v. FCC*, 120 F.3d at 804, as well as the FCC Ruling, 14 FCC Rcd 3689. The Maryland Public Service Commission and MCI do not disagree. While Bell Atlantic suggests this authority is implicitly conferred by § 252, it would appear that explicit authority is provided by both the 1934 Act and Maryland law. *See* 47 U.S.C. § 152(b); Md. Code Ann., Pub. Util. Cos. § 2-113.

The critical question is not whether State commissions have authority to interpret and enforce interconnection agreements—we believe they do—but whether these decisions are to be reviewed by *State courts or federal courts*.

As we have noted in our analysis of §§ 251 and 252, § 252(e)(6) does not expressly confer jurisdiction on federal courts to review State commission orders enforcing negotiated interconnection agreements. And federal jurisdiction is not to be presumed or implied. Rather, it must result from a specific congressional grant, and when a statute confers jurisdiction to federal courts, we read it strictly. *See Turner*, 4 U.S. (4 Dall.) at 11. The statute conferring jurisdiction on federal courts in this case—47 U.S.C. § 252(e)(6) —authorizes federal review only of "determinations" made by State commissions under § 252. Moreover, the scope of federal court review under that authorization is only to determine whether an interconnection agreement complies with the requirements of §§ 251 and 252.

In this case no question has been raised whether the interconnection agreement between Bell Atlantic and MCI meets the requirements of §§ 251 and 252. The parties voluntarily negotiated the agreement and the Maryland Public Service Commission approved it. Moreover, even now, no party asserts that any term or provision of the agreement is illegal. Thus, no determination made by the Maryland Public Service Commission *under § 252* is being reviewed. The only § 252 determination made by the Public Service Commission was its approval of the interconnection agreement, and that approval is not being reviewed. The dispute in this case arises from the ongoing administration of an approved agreement. While this dispute was properly brought before the Maryland commission and decided by it—both because of the commission's supervisory and regulatory authority over public service companies operating in Maryland and because of the 1934 Act's

general assignment of responsibility to State commissions—the commission's decision was not a § 252 determination and therefore was not reviewable in federal court by virtue of § 252(e)(6). Thus, although the State commission may have had jurisdiction to administer and enforce interconnection agreements, review of such decisions by the commission is taken to the State courts as determined by the State review procedure preserved by the 1996 Act. *See* Md. Code Ann., Pub. Util. Cos. §§ 3-202(a), 3-204(a).

In resolving the jurisdictional question in this case by carefully respecting Congress' division of responsibilities between federal and State spheres, we do not, we believe, adversely impact the national policies promoted by Congress in the Telecommunications Act of 1996. On the contrary, with a view to thousands of approved interconnection agreements that are now in place, Congress appropriately recognized the benefit of employing the vast resources and expertise of State public service commissions to resolve ongoing disputes arising from the administration and interpretation of interconnection agreements. The disputes may amount to tens of thousands of cases. While the lack of uniformity on the question in this case—whether ISP-bound calls are local traffic subject to reciprocal compensation—is generating substantial litigation nationally, the 1996 Act's deliberate choice to preserve pre-1996 procedural structures nevertheless provides a mechanism for working out that difficulty. Indeed, the FCC has already acted within its rulemaking authority to provide a uniform position that ISP-bound calls are not subject to reciprocal compensation. *See* 47 U.S.C. § 251(d); FCC Ruling, 14 FCC Rcd 3689. And while that ruling is currently being revisited, *see Bell Atl. Tel. Cos.*, 206 F.3d 1, inevitably a uniform federal position will emerge, providing guidance to the various State commissions—and the courts that review them —for enforcing interconnection agreements and their provisions for reciprocal compensation.

But any resolution of this dispute that would require us to ignore the language of § 252(e)(6) would modify the complex structure created by Congress and only exacerbate the frustration developing from a lack of uniformity. The statutory language provides unifying mileposts for the courts, and we must be guided by them. Because the Maryland Public Service Commission's determination in this case was not a § 252 determination, its review is expressly not covered by § 252(e)(6). Accordingly, review of the determination must be obtained from State courts, which, it need not be said, are under no lesser obligation than federal courts to apply governing federal law. *See Testa v. Katt*, 330 U.S. 386 (1947).

Bell Atlantic and MCI argue that this understanding of the scope of jurisdiction conferred by § 252(e)(6) conflicts with rulings made by other circuits and, more importantly, with two statements made by the Supreme Court in a footnote to its opinion in *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366. However, neither source of authority provides persuasive support for the position urged by Bell Atlantic and MCI.

To date, four circuits have directly confronted the jurisdictional question presented here—whether § 252(e)(6) authorizes federal court review of commission actions *enforcing* interconnection agreements—the Fifth, Seventh, Eighth, and Tenth Circuits.[7] And only the Fifth and Tenth Circuits conducted any relevant analysis. The Seventh Circuit stated simply, "Decisions of state agencies implementing the 1996 Act are reviewable in federal district courts," without providing analysis to support this broad statement in the context of a suit challenging a commission's interpretation or enforcement actions. *Illinois Bell*, 179 F.3d at 570

[7] The First Circuit acknowledged that it was not "clear" whether § 252(e)(6) permits federal judicial review of State commission actions that are not "approvals or rejections," but did not decide the issue. *Puerto Rico Tel. Co. v. Telecomms. Regulatory Bd.*, 189 F.3d 1, 9-10 (1st Cir. 1999).

(quoting an earlier order in the same case that was similarly devoid of jurisdictional analysis, *see Illinois Bell Tel. Co. v. WorldCom Techs., Inc.*, 157 F.3d 500, 501 (7th Cir. 1998)). And the Eighth Circuit, in dictum and without analysis, first stated its "belie[f] that the enforcement decisions of state commissions would . . . be subject to federal district court review under subsection 252(e)(6)." *Iowa Utils. Bd. v. FCC*, 120 F.3d at 804 n.24. This statement appeared in a footnote in a section of analysis that the Supreme Court held the Eighth Circuit should not have reached because the issue was not ripe for review. *See Iowa Utils.*, 525 U.S. at 386. Then later, it simply deferred to the FCC in finding jurisdiction. *See Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 946 (8th Cir. 2000).

The Fifth Circuit held that "federal court jurisdiction extends to review of state commission rulings on complaints pertaining to interconnection agreements and that such jurisdiction is not restricted to mere approval or rejection of such agreements." *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 208 F.3d 475, 481 (5th Cir. 2000). In reaching this conclusion, the court recognized that § 252(e)(6) could be read literally to limit federal review of State commissions to decisions "approving or disapproving, or arbitrating, an interconnection agreement." *Id.* at 479. But the court rejected that reading because it concluded, "We do not think so narrow a construction was intended." *Id.* The court then reasoned that assignment to State commissions "of plenary authority to approve or disapprove these interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of [such] agreements." *Id.* Thus, it concluded, an enforcement action, as an implied State commission power under § 252, is a determination reviewable in federal court. *See also Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Okla., Inc.*, 235 F.3d 493, 497-98 (10th Cir. 2000). But finding such implied federal jurisdiction conflicts directly with § 601(c)(1) of

the 1996 Act, 47 U.S.C. § 152 note, and with the well-established principle that federal jurisdiction must be found in an explicit grant from Congress. As the analysis above demonstrates, the State commission authority to enforce interconnection agreements derives not from the grant of authority in § 252(e)(1) to approve or reject interconnection agreements, but from the residual authority of State commissions and courts conferred by 47 U.S.C. § 152 and by State law, and preserved by the 1996 Act.

Bell Atlantic and MCI alsc place great stress on two statements made by the Supreme Court in footnote 6 of its opinion in *Iowa Utilities*. *See Iowa Utils.*, 525 U.S. at 378-79 n.6. In the first, the Court stated that

> the question in this case is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has.

Id. This remark, which was directed at the suggestion that the FCC lacks rulemaking authority with respect to the regulation of local competition, does not resolve the question before us. The statement surely cannot mean that the Act deprived the States of all regulatory authority in the field because this would be inconsistent with the statute itself. *See, e.g.*, 47 U.S.C. §§ 152 note, 251(d)(3), 252(e)(3), 253(b), (c); *see also* H. Conf. Rep. No. 104-458, at 126, *reprinted in* 1996 U.S.C.C.A.N. 124, 137 (Section 252(e) "preserves State authority to enforce State law requirements"). At most, this statement advances the unremarkable proposition that, where the 1996 Act speaks and conflicts with State law, the latter must yield. But the supremacy of federal law can be vindicated in State court as well as federal. *See Testa v. Katt*, 330 U.S. 386.

In the second footnote statement relied upon by Bell Atlantic and MCI, the Court observed that under the

views expressed in both the majority and dissenting opinions, "if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *Iowa Utils.*, 525 U.S. at 379 n.6. Again this must be true, as far as it goes. But it does not go so far as to constitute a jurisdictional ruling. The Court could not have meant to suggest that a federal court has jurisdiction under the Act to review any State commission action whenever the court feels the commission is not acting "in accordance with federal policy." On the contrary, the statement *presupposes* the statutory scope of existing federal jurisdiction and describes its effect; it does not purport to define that scope or extend it. In context, the statement would be just as sensible if the modifier "federal" were removed. The Court was merely emphasizing that the invocation of "what might loosely be called 'States' rights,'" *id.*, was out of place because the issue before the Court was not whether federal law applied, but whether it should be applied with deference given to the FCC's interpretations.

At bottom, 47 U.S.C. § 252(e)(6) authorizes federal court review only of State commission "determinations" made "under this Section [§ 252]," leaving all other review to State courts in the manner that it existed before the 1996 Act. And State commission orders administering and enforcing interconnection agreements are not § 252 determinations. They are routine State commission determinations made by State commissions within their retained powers, and accordingly they are reviewable only by State courts in accordance with State law that the 1996 Act has preserved.

VI. Federal-Question Jurisdiction

Bell Atlantic contends alternatively that subject matter jurisdiction is justified by 28 U.S.C. § 1331, which confers federal jurisdiction over civil actions "arising under the Constitution, laws, or treaties of the United States." We also reject this argument, because

we conclude that in light of the limited grant of federal jurisdiction in 47 U.S.C. § 252(e)(6), the exercise of § 1331 general federal-question jurisdiction would "flout, or at least undermine, congressional intent." *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986).

As we detailed in Part V, above, the Telecommunications Act of 1996 carefully divides jurisdiction between the federal courts and the State courts, explicitly admonishing that the 1996 Act should not be construed to change preexisting assignments of responsibility "unless expressly so provided" in the 1996 Act or its amendments. 47 U.S.C. § 152 note. As we likewise noted above, the 1996 Act confers jurisdiction on federal courts to review State commissions' determinations only when the question is whether an interconnection agreement "meets the requirements of section 251 and this section [§ 252]." 47 U.S.C. § 252(e)(6). For review of other State commission determinations, the 1996 Act leaves jurisdiction with the State commissions and courts. It would be nonsensical to conclude that even though Congress carefully articulated jurisdictional responsibility in the 1996 Act, it nonetheless intended to have 28 U.S.C. § 1331 override this effort. As we have noted previously about coordinating specific federal jurisdictional statutes with 28 U.S.C. § 1331, section 1331 "is a *general* federal-question statute, which gives the district courts original jurisdiction unless a specific statute assigns jurisdiction elsewhere." *International Science & Tech. Inst., Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1154 (4th Cir. 1997).

In addition to this logical coordination of federal jurisdictional statutes, the proper application of § 1331 itself is derived by understanding that the clause "arising under the laws of the United States" requires an analysis of the federal law implicated to determine whether Congress intended the resolution of cases under that law to occur in federal courts. *See generally*,

13B Wright, Miller & Cooper, *Federal Practice & Procedure* § 3562 (1984 and Supp. 2000). Thus, in *Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15 (1982), the Supreme Court, in construing the reach of § 1331, looked carefully at the congressional intent with respect to the federal statute in question to determine whether disputes under *that statute* were intended to be resolved in federal courts or in State courts. Indeed, the circumstances in *Jackson* are closely analogous to those here. Presented with the question of whether federally created contract provisions were to be construed in federal courts under the authority of § 1331 or in State courts, the Court held, looking to the underlying law, that "Congress intended those contracts to be governed by state law applied in state courts." *Id.* at 29; *see also Merrell Dow*, 478 U.S. at 811 ("Congress did not intend a private federal remedy for violations of the statute that it enacted"); *cf. Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799, 806-07 (4th Cir. 1996) (holding that "while routine transactional questions about the sale and transfer of [pollution] allowances are to be resolved [in State court] through application of standard principles of commercial law, the issues about who is entitled to share in the EPA's initial allocation of [pollution] allowances . . . raise questions of federal law" that are "sufficiently substantial to arise under federal law within the meaning of 28 U.S.C. § 1331.").

In this case, Congress created a limited federal right of review of State commission determinations as defined in 47 U.S.C. § 252(e)(6), and otherwise it intended for the right of review to be exercised in State courts. The simple fact that interconnection agreements are "creations of federal law" does not make their interpretation a sufficiently substantial federal question to confer jurisdiction under 28 U.S.C. § 1331. *Jackson*, 457 U.S. at 23; *see also id.* at 21; *International Science*, 106 F.3d at 1154 (describing the Supreme Court's decision in *Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900), as holding that "notwithstanding the federal

statutory basis, Congress [had] intended that because of the predominance of state issues the cases be litigated in state courts").

Finally, it would violate basic tenets of federalism to conclude, in the absence of specific federal authorization, that a federal court may review a State quasi-judicial body, such as the Maryland Public Service Commission. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476-77 (1983) (noting that federal courts may, if authorized, review State commissions when acting in a *legislative* capacity, as distinct from a *judicial* capacity). We have noted repeatedly that "[a]s a jurisdictional doctrine, *Rooker-Feldman* precludes the lower federal courts from second-guessing the merits of [a] state court judgment."[8] *Brown & Root, Inc. v. Breckenridge*, 211 F.3d 194, 202 (4th Cir. 2000). While strict application of the doctrine requires a final judgment from State courts, the federal intrusion into State affairs is not any less when the judgment issues from a State quasi-judicial body.

Accordingly, we conclude that 28 U.S.C. § 1331 does not provide federal jurisdiction over Bell Atlantic's claims in the circumstances of this case where Congress intended that federal jurisdiction be limited to the grant in 47 U.S.C. § 252(e)(6). *But cf. GTE N., Inc. v. Strand*, 209 F.3d 909, 919 (6th Cir. 2000) (finding § 1331 jurisdiction where § 252(e)(6) jurisdiction was lacking for cases that are "the product . . . of an independent state law proceeding"), *petition for cert. filed*, 69 U.S.W.L. 3087 (U.S. July 17, 2000) (No. 00-101).

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[8] The *Rooker-Feldman* doctrine, providing that lower federal courts are not authorized to review final judgments from State court proceedings, emanates from two Supreme Court decisions: *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

VII. Summary of Conclusions

In sum, this federal action by Bell Atlantic against the Maryland Public Service Commission and its individual members in their official capacity is barred by the Eleventh Amendment, and the State parties did not waive that immunity by participation in the regulation of interconnection agreements, because Congress did not manifest an intent that these parties waive Eleventh Amendment immunity as a condition to participation in the federal regulatory scheme.

Moreover, the doctrine of *Ex parte Young* does not provide an exception for the action against the individual State officials because (1) the State officials' decision was based on State contract law and arguably did not involve an ongoing violation of federal law, and (2) the federal interests served in making State officials parties to this federal court action under 47 U.S.C. § 252(e)(6) are marginal, if not nonexistent, and do not outweigh countervailing interests of federalism.

As to the action against MCI and the other LECs, the claims—seeking a declaratory judgment to interpret and an injunction to enforce already approved interconnection agreements—do not fall into the category of actions identified by 47 U.S.C. § 252(e)(6) for resolution in federal court. Such claims are left by the 1996 Act for resolution by State commissions and for review in State courts, and therefore federal courts have no jurisdiction to decide them. Moreover, 28 U.S.C. § 1331 does not operate to confer the jurisdiction that Congress withheld by the 1996 Act.

For these reasons, we affirm the judgment of the district court.

AFFIRMED.

KING, Circuit Judge, dissenting:

It can hardly be stated more convincingly than Justice Scalia already has: "[T]here is no doubt . . . that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 379 n.6 (1999). In defiance of Justice Scalia's clear admonition, the majority injects equivocation where once there was certitude. Where order once reigned, chaos now impinges.

I agree there is *no* doubt that federal courts may review the decisions of state regulators such as the Maryland Public Service Commission ("Commission") that enforce interconnection agreements under the Telecommunications Act ("Act"). If Justice Scalia is right, then the majority's position that the Commission and its individual members are entitled to Eleventh Amendment immunity is simply wrong. By its decision today, the majority isolates itself not only from Justice Scalia's pronouncement, but also from every other court of appeals that has decided these issues.

I am convinced that the other circuits have correctly apprehended and applied the law. In my view (and I am far from alone), the district court's decision should be reversed, and this case should be remanded for further proceedings.

I.

Five of our sister circuits have meticulously reviewed the issues raised in this action and reached sound conclusions in deciding them. The Fifth, the Seventh, the Eighth, and the Tenth Circuits have each held that district courts possess jurisdiction to review the decisions of State commissions in enforcing—rather than merely accepting or rejecting—interconnection agreements. *See Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Okla., Inc.*, 235 F.3d 493, 496-97 (10th Cir. 2000); *Southwestern Bell Tel. Co. v. Connect*

Communications Corp., 225 F.3d 942, 947 (8th Cir. 2000); *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 337-38 (7th Cir. 2000), *cert. denied sub nom. Public Serv. Comm'n v. Wisconsin Bell, Inc.*, 121 S. Ct. 896 (2001); *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 208 F.3d 475, 479-80 (5th Cir. 2000).

Moreover, the Fifth, the Seventh, and the Tenth Circuits have each held that a state waives Eleventh Amendment immunity by electing to participate in the regulation of local telephone service pursuant to the Act. *See AT&T Communications v. BellSouth Telecomms., Inc.*, No. 99-30421, 2001 WL 38281, at *10 (5th Cir. Jan. 16, 2001); *Illinois Bell*, 222 F.3d at 342; *MCI Telecomms. Corp. v. Public Serv. Comm'n*, 216 F.3d 929, 938-39 (10th Cir. 2000). These courts have also held that actions may be brought in the district courts, pursuant to *Ex parte Young*, 209 U.S. 123 (1908), to compel individual commissioners to cease ongoing violations of federal law. *See AT&T Communications*, 2001 WL 38281, at *11; *Illinois Bell*, 222 F.3d at 345; *Public Serv. Comm'n*, 216 F.3d at 939. Earlier, in *Michigan Bell Telephone Co. v. Climax Telephone Co.*, 202 F.3d 862, 867 (6th Cir.), *cert. denied sub nom. Strand v. Michigan Bell Telephone*, 121 S. Ct. 54 (2000), the Sixth Circuit provided a model that the Fifth, Seventh, and Tenth Circuits followed with regard to the *Ex parte Young* issue.[1] I find these deci-

[1] District courts, too, have recognized that the federal courts possess jurisdiction to review the enforcement decisions of State commissions. *See, e.g., Michigan Bell Tel. Co. v. Climax Tel. Co.*, 121 F. Supp. 2d 1104, 1114-15 (W.D. Mich. 2000); *BellSouth Telecomms., Inc. v. MCI Metro Access Transmission Servs.*, 97 F. Supp. 2d 1363, 1369 (N.D. Ga. 2000). Still more district courts have held that a state waives the Eleventh Amendment defense by participating in the regulation of interconnection agreements. *See, e.g., Bell Atlantic-Pa., Inc. v. Pennsylvania Pub. Util. Comm'n*, 107 F. Supp. 2d 653, 660-62 (E.D. Pa. 2000); *Bell Atlantic-Del., Inc. v. McMahon*, 80 F. Supp. 2d 218, 233 (D. Del. 2000); *Bell Atlantic-Del., Inc. v. Global Naps S., Inc.*, 77 F. Supp. 2d 492, 500 (D. Del. 1999); *AT&T Communications of the Southwest, Inc. v. Southwestern Bell Tel. Co.*, 86 F. Supp. 2d 932, 946-47 (W.D. Mo. 1999), *rev'd*

sions highly persuasive in addressing the jurisdictional and immunity issues advanced in this proceeding.

II.

A.

My first major area of disagreement with the majority concerns whether federal courts possess subject matter jurisdiction to review decisions of State commissions in enforcing interconnection agreements.[2] The majority is incorrect in its conclusion that the Act, specifically 47 U.S.C. § 252(e)(6),[3] limits federal court

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in part & vacated in part on other grounds sub nom. Southwestern Bell Tel. Co. v. Missouri Pub. Serv. Comm'n, Nos. 99-3833 & 99-3908, 2001 WL 13289 (8th Cir. Jan. 8, 2001). Many of these same courts have concluded that the *Ex parte Young* exception allows actions against individual commissioners to end ongoing violations of federal law. *See Bell Atlantic-Pa.*, 107 F. Supp. 2d at 662-64; *McMahon*, 80 F. Supp. 2d at 233-34; *Global Naps S.*, 77 F. Supp. 2d at 500-01; *AT&T Communications*, 86 F. Supp. 2d at 947-48.

It appears that only one district court—not yet overruled—agrees with the majority's position on the Eleventh Amendment issues. *See BellSouth Telecomms.*, 97 F. Supp. 2d at 1373 (holding that the Eleventh Amendment bars action pursuant to the Act against the State commission and its individual members). The Sixth Circuit has suggested, but has not definitively concluded, that the constructive waiver doctrine is inapplicable in cases under the Act. *See GTE N., Inc. v. Strand*, 209 F.3d 909, 922 n.6 (6th Cir.), *cert. denied sub nom. Strand v. Verizon N. Inc.*, 121 S. Ct. 380 (2000).

[2] Curiously, the majority addresses this threshold question only after unnecessarily reaching the merits of the claims of Eleventh Amendment immunity. Because the majority ultimately holds that this entire action is barred on jurisdictional grounds, it should not have considered the constitutional issue. *See Hoffman v. Hunt*, 126 F.3d 575, 582 (4th Cir. 1997) ("[W]e need not reach the constitutional question if there exists an alternative, nonconstitutional basis for our decision.") (citing *Peters v. Hobby*, 349 U.S. 331, 338 (1955)).

[3] The critical statutory provision here, § 252(e)(6) of the Act, provides as follows:

> In any case in which a State commission makes a determination under this section [252], any party aggrieved by such determination may bring an action in an appropriate Federal district

review to only those State commission determinations in which an interconnection agreement is initially approved or rejected, and disallows federal court review of determinations regarding the interpretation and enforcement of an existing agreement. Along with the circuits that have considered the jurisdictional issue, I "do not think so narrow a construction [of § 252] was intended." *Southwestern Bell*, 208 F.3d at 479; *accord Brooks Fiber Communications*, 235 F.3d at 497; *Connect Communications*, 225 F.3d at 947; *Illinois Bell*, 222 F.3d at 337-38; *see also Puerto Rico Tel. Co. v. Telecommunications Regulatory Bd.*, 189 F.3d 1, 10 (1st Cir. 1999) (assuming, without deciding, that federal courts possess jurisdiction under § 252(e)(6) to review State commission determinations interpreting and enforcing existing agreements).

1.

Subsection 252(e)(6) expressly confers jurisdiction on the federal courts to review determinations made by State commissions pursuant to § 252. Thus, the critical question is whether the Commission's power to enforce the interconnection agreement here arises under § 252. The answer is that it does—that is, the power granted to states under § 252 to approve or reject interconnection agreements, be they negotiated or arbitrated, "necessarily includes the power to enforce the interconnection agreement." *Connect Communications*, 225 F.3d at 946 (citing *Southwestern Bell*, 208 F.3d at 479-80 (internal citations omitted)); *see also Illinois Bell*, 222 F.3d at 338. Importantly, this is also the view of the FCC. *See Starpower Communications, LLC*, 15 F.C.C.R. 11,277, at ¶ 6 (2000).[4] And we must defer to

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> court to determine whether the agreement or statement meets the requirements of section 251 of this title [47] and this section [252].

[4] In *Starpower Communications*, the FCC ruled that the Virginia State Corporation Commission failed to carry out its responsibility under § 252 by declining jurisdiction to enforce an existing interconnection agreement. *See Starpower Communications*, 15 F.C.C.R.

the ruling of the FCC because it is a reasonable interpretation of the statute. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see also Brooks Fiber Communications*, 235 F.3d at 497; *Connect Communications*, 225 F.3d at 946.

In summary, § 252 empowers State commissions to interpret and enforce existing agreements, and thus § 252(e)(6) expressly confers jurisdiction on the federal courts to review the states' enforcement determinations. Because the Act contains this express grant of federal jurisdiction, the majority's conclusion—that the Maryland courts possess default jurisdiction pursuant to state law and remnants of the original 1934 Act —cannot withstand scrutiny.

2.

A related issue presented here is whether the Commission's enforcement decision regarding reciprocal compensation for calls to Internet Service Providers ("ISPs") presents a question of the interconnection agreement's compliance with the requirements of §§ 251 and 252. The answer, again, is that it does—that is, "§ 252(e)(6)'s grant of jurisdiction to the federal courts to review for compliance with §§ 251 and 252 includes the power to ensure that the state commission's enforcement actions are consistent with federal law." *Connect Communications*, 225 F.3d at 948. This is true because, rather than limiting State

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11,277, at ¶¶ 6-7. Specifically, the FCC determined that "a dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements is within the states' 'responsibility' under section 252." Id. at ¶ 6. Yet, as if the context in which the underlying conclusion was reached somehow undermines its import, the majority disregards the FCC ruling by endeavoring to distinguish the situation in *Starpower Communications*, where a State commission fails to act, from the scenario here, where a commission does act but a party seeks review of its determination in federal court. I am unpersuaded by the majority's unsubstantiated and illogical pronouncement that the FCC ruling "does not bear on this case." *See ante*, at [39a] n.6.

commission scrutiny to a few narrow technical points, § 252 permits examination of broad factors including "the public interest, convenience, and necessity." *Id.* (quoting § 252(e)(2)(A)(ii)). Certainly, these considerations include compliance with federal law. *See id.* Here, the complaint filed by Bell Atlantic Maryland, Inc., ("Bell Atlantic") alleges that the Commission violated federal law in two ways: (1) by failing to apply FCC decisions ruling that Internet calls are not local to the interconnection agreement at issue, and (2) by erroneously holding that the FCC required the commission to impose reciprocal compensation for Internet calls. These allegations, coupled with the evolving opinions pertaining to ISP-bound traffic from the FCC and the courts, bespeak the questions of federal law underlying this action. *See id.* at 947-48.

3.

Obviously, this proceeding may also raise issues of state contract law; for example, the Commission attempted to ascertain the intention of the parties to the interconnection agreement. Because the district courts possess jurisdiction to review State commission determinations under § 252, and because those determinations may include issues of state law, the district courts may properly consider any related state law issues. *See Brooks Fiber Communications*, 235 F.3d at 498; *Southwestern Bell*, 208 F.3d at 482. This appraisal is limited, however, by the standards of review that we have already adopted. *See GTE South, Inc. v. Morrison*, 199 F.3d 733, 745 (4th Cir. 1999) (designating de novo standard for review of State commission interpretations of the Act, and substantial evidence standard for all other determinations).

B.

Unfortunately, by its holding that federal court jurisdiction is limited to reviewing the approval and rejection of interconnection agreements by State

commissions, the majority will create a confusing and unworkable scheme of federal and state review that is bound to produce absurd results. First, as the Tenth Circuit explained:

> A rule that restricted a district court's jurisdiction to review of a state commission's approval or rejection of an interconnection agreement would lead to results that Congress could not have intended. Under such a rule, certain state commission decisions would escape federal review simply because the dispute arose after the agreement had been approved.

Brooks Fiber Communications, 235 F.3d at 497. Second, the majority's holding—if imprudently followed across the country—could result in fifty states reaching fifty different conclusions about the interpretation of an important federal statute. And, finally, the majority's position undermines, and renders entirely meaningless, the recent explicit statement of Justice Scalia that "there is no doubt . . . that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *Iowa Utils. Bd.*, 525 U.S. at 379 n.6. For these reasons, I strongly disagree with the majority's conclusion that the Act confers only the narrowest jurisdiction on federal courts.[5]

III.

My next major area of disagreement with the majority relates to whether a federal proceeding against the Commission and its individual members is constitutionally barred. As the majority recognizes, the

[5] Because jurisdiction is provided in the district courts by § 252(e)(6), it is unnecessary for us to reach the argument that 28 U.S.C. § 1331 confers general federal question jurisdiction. I note, however, that contrary to the assertion of the majority, *see ante*, at [50a], the *Rooker-Feldman* doctrine has no application here.

sovereign immunity accorded states under the Eleventh Amendment is not absolute. Specifically, there is no sovereign immunity defense available where one of three exceptions applies: (1) Congress, while acting pursuant to its powers under the Fourteenth Amendment, has properly abrogated a state's immunity, *see Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59 (1996); (2) a state has waived its immunity by consenting to suit in federal court, *see College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999); or (3) a private party sues an appropriate state officer for prospective injunctive or declaratory relief from an ongoing violation of federal law, *see Ex parte Young*, 209 U.S. at 159-60. The first of these three exceptions, the abrogation exception, has no application here.[6] However, both the waiver exception and the *Ex parte Young* exception do apply.

A.

First of all, it is elementary that a state may waive its Eleventh Amendment immunity, either explicitly or constructively. Although the Supreme Court has significantly limited the constructive waiver doctrine, even the majority acknowledges that a state still "may implicitly waive its sovereign immunity by accepting from Congress a 'gift' or a 'gratuity,' the receipt of which is made conditional on the State's waiver of immunity." *Ante*, at [17a] (citing *College Sav. Bank*, 527 U.S. at 686-87 (internal citations omitted)). I agree with the view of the Fifth, Seventh, and Tenth Circuits that, with respect to the Act, a state waives the defense of sovereign immunity by electing to participate in the regulation of interconnection agreements. *See AT&T Communications*, 2001 WL 38281, at *10; *Illinois Bell*, 222 F.3d at 342; *Public Serv. Comm'n*, 216 F.3d at

[6] The abrogation exception does not apply because, in passing the Act, Congress acted pursuant to its powers under Article I of the Constitution, rather than the Fourteenth Amendment. *See, e.g., Illinois Bell*, 222 F.3d at 338 (citing 47 U.S.C. § 151).

938-39. This position does not require "heroic assumptions," as asserted by the majority, but simply requires adherence to a plain reading of the Act.

1.

The first inquiry we must make is simple—whether Congress, with sufficient clarity, invited the states to waive their Eleventh Amendment immunity. *See Illinois Bell*, 222 F.3d at 340; *see also Abril v. Virginia*, 145 F.3d 182, 189 n.13 (4th Cir. 1998) (holding that Congress cannot elicit a constructive waiver of Eleventh Amendment immunity from a state without "having plainly stated its intention that participation by a State in the regulated activity would be deemed an implied waiver of immunity") (citation omitted). Under 47 U.S.C. § 252, the states are given the choice of participating in the federal government's regulation of local telephone service. If a state does not choose to participate, the FCC acts in its place. *See* § 252(e)(5). If, on the other hand, a state does choose to participate, its role in the mediation, arbitration, and review process for interconnection agreements is defined and controlled by § 252. Moreover, if a state chooses to participate, its determinations are subject to review by the federal courts. *See* § 252(e)(6) ("In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section."); *see also* § 252(e)(4) ("No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.").

Although not as blunt as the example singled out by the majority as providing adequate notice of a waiver

requirement,[7] these Act provisions clearly show Congress's intent to subject participating states to suits in federal court. *See Public Serv. Comm'n*, 216 F.3d at 938 ("[Section] 252 puts Utah on notice that Congress intends to subject it to suits brought by individuals if it acts under § 252."); *Illinois Bell*, 222 F.3d at 341 (finding that the structure of § 252 "makes clear that Congress intended to provide for federal court review of any regulatory determination made under the section, whether by a state commission or, if the state commission chooses not to act, by the FCC acting in its place"); *see also Bell Atlantic-Pa., Inc. v. Pennsylvania Public Util. Comm'n*, 107 F. Supp. 2d 653, 661 (E.D. Pa. 2000) (holding that "although the [Act] does not contain explicit waiver language, the structure of the statute clearly expresses Congress'[s] intent that 'states could participate in the federal regulatory function delegated to them by the federal government on the condition that their participation be reviewable in federal court'" (quoting *Illinois Bell*, 222 F.3d at 341)).

2.

According to the majority, when a State commission elects to make § 252 determinations, it merely consents to review of its decisions in federal court, rather than being made a party to the review proceeding. The majority maintains that it requires "a leap of logic" to infer consent to be made a party from consent to federal court review. In my view, no such "leap of logic" is either necessary or compelled, because consent to federal court review necessarily entails being made a

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[7] The majority relies on *Litman v. George Mason University*, 186 F.3d 544, 554 (4th Cir. 1999), a decision involving the Rehabilitation Act, which "states outright that a State 'shall not be immune under the Ele-venth Amendment . . . from suit in Federal court' for a violation of the act's anti-discrimination edict." *Ante*, at [18a-19a] (citation omitted). Although this provision is useful in its explicitness, such precise lan-guage is not required as long as Congress's intent to require waiver is clear.

party to the action. The Seventh Circuit has held that when the provisions of the Act are read as a whole, it is obvious that the Act permits suits against State commissions in federal court, not just federal review of the interconnection agreements themselves. *See Illinois Bell*, 222 F.3d at 337. As that court explained:

> At the outset, we note that the subsection providing for judicial review is titled "Review of State commission actions," not "Review of interconnection agreements," thus signaling that Congress intended that the state commissions be parties to the federal court suits reviewing their actions, just as the FCC is a party to suits seeking review of its actions. Moreover, subsection 252(e)(4), when read in conjunction with subsection 252(e)(6), provides additional evidence that Congress contemplated suits against state defendants in federal court. Subsection 252(e)(4) provides that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." This language indicates that Congress envisioned suits reviewing actions by state commissions, as opposed to suits reviewing only the agreements themselves, and that Congress intended that such suits be brought exclusively in federal court.

Id. (internal citation omitted); *see also Michigan Bell*, 202 F.3d at 868.

Indeed, by allowing State commissions to substitute as regulators for the FCC, Congress obviously intended that State commissions, just like the FCC, be made parties to federal court actions challenging their decisions. In fact, as the majority notes, even Maryland recognizes that the Commission may necessarily be made a party to an appeal of its own decision. *See* Md. Code Ann., Pub. Util. Cos. § 3-204(d). As the Sixth Circuit expounded:

> It is the PSC's duty, if it chooses to regulate, not[that of the other party to the agreement], to ensure that the agreement meets the requirements of the Act both at the time of arbitration, 47 U.S.C. § 252(c), and at the time of approval, 47 U.S.C. § 252(e)(2)(B). Furthermore, it is the PSC's function, not the other party's, to enforce the agreement. Lacking power to enjoin the PSC from enforcing the approved agreement, federal courts would have little effective remedy for aggrieved plaintiffs, or would subject companies to the intolerable prospect of conflicting commands from federal courts and state regulatory agencies.

Michigan Bell, 202 F.3d at 868. Such irreconcilable holdings among state and federal courts would undermine Congress's regulatory scheme. Thus, State commissions must be available as parties for federal court review of their determinations. Any other notion would again undermine Justice Scalia's observation that State commissions acting in defiance of federal policy may be "brought to heel" by the federal courts. *See Iowa Utils. Bd.*, 525 U.S. at 379 n.6.

3.

Because Congress clearly invited the states to participate in the regulation of interconnection agreements in exchange for waiver of their Eleventh Amendment immunity, our next inquiry is whether a state, by accepting the invitation to participate, unequivocally agrees to waive its immunity. *See Illinois Bell*, 222 F.3d at 342 ("As the Supreme Court has noted, there is a 'fundamental difference' between 'Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived [its] immunity' and 'a State's expressing unequivocally that it waives its immunity.'" (quoting *College Sav. Bank*, 527 U.S. at 680-81). In order to be valid, a waiver must be "conditioned on the state's truly voluntary acceptance of a federal 'gratuity.'" *Id.*; *see also Public Serv.*

Comm'n, 216 F.3d at 937.[8] A waiver is coerced—not voluntary—"when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity." *College Sav. Bank*, 527 U.S. at 687.

Thus, we must determine whether a state's participation in the regulation of local telephone service is, on the one hand, a "gratuity" bestowed by Congress or, on the other hand, an "otherwise lawful activity" which the states may conduct without federal consent. Prior to 1996, the states regulated phone services within their own borders; however, the Act "unquestionably" took away regulation of local telecommunications competition from the states with regard to matters addressed by the Act. *See Iowa Utils. Bd.*, 525 U.S. at 379 n.6; *see also id.* at 402-05 (Thomas, J., concurring in part & dissenting in part) (recounting the pre-Act history of federal and local telecommunications regulation). The Act now may invite the states to participate in the regulation of interconnection agreements, but it is of utmost significance that "[a]lthough it did not do so, Congress could have preempted *all* state regulation of local phone service." *Public Serv. Comm'n*, 216 F.3d at 938 (citing *FERC v. Mississippi*, 456 U.S. 742, 764 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290-91 (1981)) (emphasis added); *see also Illinois Bell*, 222 F.3d at 342; *Bell Atlantic-Pa.*, 107 F. Supp. 2d at 661.

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[8] In this context, Congress bestows a "gratuity" when it offers to do something it otherwise has no obligation to do. For example: "Under the Compact Clause, . . . States cannot form an interstate compact without first obtaining the express consent of Congress; the granting of such consent is a gratuity. So also, Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts." *College Sav. Bank*, 527 U.S. at 686-87 (referring to two decisions allowing Congress to extract constructive waivers of state sovereign immunity: *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959) and *South Dakota v. Dole*, 483 U.S. 203 (1987)).

Because the states may not regulate local telecommunications in defiance of the Act, their participation in the regulation of interconnection agreements is a gratuity bestowed by Congress; it is clearly not an activity in which the states may lawfully engage on their own terms. As the Tenth Circuit recently explained:

> [W]ith the passage of the 1996 Act, Congress essentially transformed the regulation of local phone service from an otherwise permissible state activity into a federal gratuity. . . . Congress was under no obligation to allow states to participate in the Act's regulatory scheme. Accordingly, by conditioning a state's ability to regulate local phone service on its consent to suit in federal court, Congress threatened the state with the denial of a gratuity rather than exclusion from an otherwise lawful activity.

Public Serv. Comm'n, 216 F.3d at 938; *see also Illinois Bell*, 222 F.3d at 343. The majority comments:

> The district court noted that the Act "stripped the states of local power to regulate telecommunications that had been vested in them for decades," and remarked, "Some gift." *Cf.* Virgil, *Aeneid*, bk. II, l. 49 ("Whatever it is, I fear Greeks even when they bear gifts" (reporting the comments of the Trojan priest Laocoon upon seeing the large wooden horse left by the Greeks as a "gift" to the city of Troy)).

Ante, at [19a] n.3. This analogy is inapposite, however, because we are dealing with a horse of a different color. The mere happenstance that the states once reserved the power to regulate intrastate telephone service does not, as the majority suggests, diminish the gratuity status of the states' option to participate in regulation under the Act. Nor is this gratuity filled with hidden danger for any unwary recipient.

Because the waiver here was conditioned upon acceptance of a gratuity, the majority further errs in drawing parallels between this scenario and that in *Parden v. Terminal Ry. of the Ala. State Docks Dep't*, 377 U.S. 184 (1964), *overruled by College Sav. Bank*, 527 U.S. at 680. In *Parden*, the State of Alabama exercised its sovereign authority to operate a railroad; that is, the state engaged in an "otherwise lawful activity" that may have been regulated by Congress, but required no federal consent for the state to participate. On the other hand, in the scenario presented here, "[u]nlike the situation in *Parden* . . . , the states are not merely acting in an area regulated by Congress; they are now voluntarily *regulating on behalf of Congress*." *Illinois Bell*, 222 F.3d at 343 (emphasis in original). In *Parden*, the State of Alabama acted on its sovereign authority; here, the State of Maryland acted pursuant to a gratuitous grant of authority from Congress. *See Illinois Bell*, 222 F.3d at 343; *see also Bell Atlantic-Del., Inc. v. Global Naps S., Inc.*, 77 F. Supp. 2d 492, 500 (D. Del. 1999) ("Because the PSC was not exercising its sovereign authority in its arbitration of the interconnection agreement . . . , it is not entitled to sovereign immunity for its acts.").

The situation presented here instead parallels those in *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959) (upholding a waiver requirement where states received a gratuity from Congress—approval of an interstate compact pursuant to the Compact Clause), and *South Dakota v. Dole*, 483 U.S. 203 (1987) (holding that Congress could impose conditions on a state's acceptance of federal funds allocated under the Spending Power). The type of waiver required by Congress in *Petty* and in *Dole*—one conditioned on receipt of a gift or gratuity—has been endorsed by the Supreme Court. *See College Sav. Bank*, 527 U.S. at 686. And, contrary to the assertions of the majority, that is exactly the type of waiver at issue here. It must be concluded, therefore, that Congress extended the Commission a clear invitation to participate in the

regulation of interconnection agreements in exchange for the waiver of its Eleventh Amendment immunity, and the State of Maryland unequivocally agreed to waive its immunity by choosing to accept this gratuity from Congress.

B.

Even if Maryland had not waived its Eleventh Amendment immunity, the individual members of the Commission still may be sued in their individual capacities, pursuant to *Ex parte Young*, for prospective injunctive relief. 209 U.S. at 155-56 (finding exception to general rule of state sovereign immunity where there are suits against state officials for equitable relief to end ongoing violations of federal constitutional rights); *see also Alden v. Maine*, 527 U.S. 706, 748 (1999) (affirming the vitality of *Ex parte Young* despite reaffirming states' general protections from suit); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 281 (1997) (recognizing that the *Ex parte Young* doctrine extends to violations of federal law). Contrary to the position of the majority, and in accordance with the other circuits that have considered the issue, this dispute presents "a straightforward *Ex parte Young* case." *Michigan Bell*, 202 F.3d at 867; *accord AT&T Communications*, 2001 WL 38281, at *11; *Public Serv. Comm'n*, 216 F.3d at 939-40; *Illinois Bell*, 222 F.3d at 345; *see also Bell Atlantic-Pa.*, 107 F. Supp. 2d at 663; *Global Naps S.*, 77 F. Supp. 2d at 500.[9]

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[9] The majority suggests that "it is more likely that State-contract-law, rather than federal-law, violations would be redressed" in Bell Atlantic's action against the individual commissioners, and thus the *Ex parte Young* exception does not apply here. *Ante*, at [25a-28a, 29a]. However, because we are reviewing the district court's grant of a motion to dismiss, we review the sufficiency of the complaint de novo. *See Al-Abood v. El-Shamari*, 217 F.3d 225, 233 (4th Cir. 2000). In its complaint, Bell Atlantic alleges that the Commission violated the Act by failing to apply—and by misinterpreting—the FCC ruling regarding ISP-bound traffic. Because the complaint states a claim for equitable relief from an ongoing violation of federal law, the complaint against the

1.

The majority inaptly notes that Congress authorized actions against State commissions, as distinct from individual commissioners. The majority comments that "[n]owhere under the State public utilities law is regulatory power conferred upon an individual commissioner and nowhere is an individual commissioner made subject to suit for the Public Service Commission's regulatory actions." *Ante*, at [22a] n.4. In my view, this point simply misses the essence of *Ex parte Young*: when state officials act in violation of federal law, their acts are stripped of state authority and they have no claim to any protection that might otherwise be provided by the Eleventh Amendment. That is, when

> [t]he act to be enforced is alleged to be unconstitutional [or violative of federal statute] . . . the use of the name of the state to enforce [such] act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting to use the name of the State to enforce a legislative enactment which is void because unconstitutional [or violative of federal statute].

Ex parte Young, 209 U.S. at 159. The Supreme Court's distinction between a state and its officers—albeit a distinction that can be described as "an obvious fiction," *Coeur d'Alene Tribe*, 521 U.S. at 270—means that Congress need not, as the majority seems to suggest, explicitly authorize actions against individual commissioners.

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individual commissioners is entirely sufficient to survive a motion to dismiss. *See Michigan Bell*, 202 F.3d at 867.

2.

In refusing to apply the *Ex parte Young* exception to the proceeding, the majority also advances faulty arguments that: (1) there is no federal interest that would be served by a suit against the individual members of the Commission, particularly inasmuch as such a suit would alter any remedial scheme established in the Act for enforcement of federal law, *see Seminole Tribe v. Florida*, 517 U.S. 44, 74 (1996); and (2) such a federal court action would unduly sacrifice Maryland's sovereign immunity, *see Coeur d'Alene Tribe*, 521 U.S. at 269-70. Contrary to the majority's position, the other circuits that have considered the issue have concluded that neither *Seminole Tribe* nor *Coeur d'Alene Tribe* renders *Ex parte Young* inapplicable. *See Illinois Bell*, 222 F.3d at 345-48; *Public Serv. Comm'n*, 216 F.3d at 940 n.8; *Michigan Bell*, 202 F.3d at 867-68.

A major difficulty undercutting the majority's position is that, unlike the Indian Gaming Regulatory Act ("IGRA") at issue in *Seminole Tribe*, the Telecommunications Act "does not impose an elaborate remedial scheme upon a reviewing court; in fact, the statute fails to specify any particular relief." *Bell Atlantic-Pa.*, 107 F. Supp. 2d at 664 (citations omitted). As the Delaware district court explained:

> In [*Seminole Tribe*], the Court noted that the federal law at issue provides for a series of limited remedies against a noncomplying State, none of which amount to a direct suit against the State. Noting that the application of *Young* would provide a stricter remedy tha[n] those contemplated by statute and would render the other remedies superfluous, the Court disallowed suit against the State under *Young*.
>
> In the present case, by contrast, the remedy provided for by statute and the remedy under *Young* are one and the same. Under § 252(e)(6), a federal court will review the PSC's ruling to see if it

> comports with federal law. Under *Young*, a federal court will review the ruling of the PSC's commissioners to determine if they properly applied federal law. There is no substantive difference between these two actions, and so *Seminole Tribe* does not bar suit against the PSC under the doctrine of *Ex parte Young*.

Global Naps S., 77 F. Supp. 2d at 501; *see also Illinois Bell*, 222 F.3d at 345-47 (parsing the detailed remedial scheme at issue in *Seminole Tribe* and rejecting a purported analogy between it and the Telecommunications Act's enforcement scheme, where "Congress has not limited the court's remedial power").

Instead of endorsing these adept analyses, the majority simply asserts that "a federal court action against State commissioners of this type would improperly expand the federal remedy selected by Congress." *Ante*, at [29a]. In so concluding, the majority builds error upon error by relying on its assertion that federal courts lack jurisdiction to review State commission decisions enforcing existing interconnection agreements. According to the majority:

> Section 252(e)(6) invokes federal court review only for State commission determinations made under § 252 to determine whether interconnection agreements are in compliance with §§ 251 and 252. If, however, we were to permit an *Ex parte Young* action to proceed against State officers, presumably to answer to a federal court injunction and potentially to face sanctions for non-compliance with that injunction, we would be supplementing the narrowly defined federal court review selected by Congress [in violation of *Seminole Tribe*].

Ante, at [28a-29a]. Even if the majority were correct about the jurisdiction issue—although it is not, *see supra* Part II—its failure to apply the *Ex parte Young* exception ignores that, even under its view, "section 252 only limits a district court's scope of review, it does

not render the [Act] vulnerable to *Seminole Tribe*'s remedial scheme limitation." *Bell Atlantic-Pa.*, 107 F. Supp. 2d at 664.

Another serious defect in the majority's stance is that Maryland's interest in the regulation of local telecommunications cannot be equated with the "special sovereignty interest" at issue in *Coeur d'Alene Tribe*—Idaho's fundamental interest in its own land. *See Illinois Bell*, 222 F.3d at 347-48. As the Seventh Circuit explained:

> In the wake of the 1996 Telecommunications Act, any "sovereign" interest Illinois and Wisconsin may have in regulating interconnection agreements . . . is derived solely from the regulatory role Congress has bestowed upon the states. Thus, the suits against the state commissioners to require compliance with the [Act] do not strike at core functions or fundamental powers of either Illinois or Wisconsin. Therefore, the availability of an *Ex parte Young* suit in our cases is not affected by the special limitation recognized by a majority of the Court in *Coeur d'Alene Tribe*.

Illinois Bell, 222 F.3d at 348 (footnote and citation omitted). Since there are no "special sovereignty interests" implicated by applying the *Ex parte Young* exception here—and since there are no other valid reasons not to apply the exception—I strongly believe that Bell Atlantic should be allowed to proceed in its action against the members of the Commission in their individual capacities.

IV.

In my opinion, the majority errs on the major points. First, the Telecommunications Act plainly confers federal court jurisdiction for review of enforcement determinations of the Commission. Secondly, the State of Maryland waived its defense of Eleventh Amendment immunity by freely electing to participate in the

regulation of local telecommunications pursuant to the Act. Lastly, the individual members of the Commission may be sued in their official capacities under *Ex parte Young* to cease ongoing violations of federal law. Because the majority holds to the contrary, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil No. S 99-2061

BELL ATLANTIC-MARYLAND, INC.,

Plaintiff,

v.

MFS INTELENET OF MARYLAND, INC.; AMERICAN COMMUNICATIONS SERVICES OF MARYLAND, INC.; RCN TELECOM SERVICES OF MARYLAND INC.; STARPOWER COMMUNICATIONS, LLC; TCG-MARYLAND; MCIMETRO ACCESS TRANSMISSION SERVICES, LLC; THE PUBLIC SERVICE COMMISSION OF MARYLAND; GLENN F. IVEY, Commissioner; CLAUDE M. LIGON, Commissioner; E. MASON HENDRICKSON; Commissioner; SUSANNE BROGAN, Commissioner; CATHERINE I. RILEY, Commissioner,

Defendants.

[Decided Oct. 20, 1999]

Before FREDERIC N. SMALKIN, United States District Judge.

MEMORANDUM OPINION

Bell Atlantic-Maryland, Inc. ("Bell Atlantic") filed a two-Count complaint against the defendants alleging that The Public Service Commission of Maryland ("the PSC") violated the Telecommunications Act of 1996. More specifically, Bell Atlantic claims that the PSC's Order No. 75280 issued June 11, 1999 ("the Order") is in direct conflict with a declaratory ruling issued

February 26, 1999 by the Federal Communications Commission ("FCC").

Now before the Court is the motion to dismiss of the PSC, and its commissioners, Ivey, Ligon, Hendrickson, Brogan and Riley (collectively, "the Commissioners"). Bell Atlantic has filed an opposition to the motion, and defendants MFS Intelenet of Maryland, Inc., MCI METRO Access Transmission Services LLC and TCG Maryland, Inc. have filed a joint opposition to the motion to dismiss. The United States of America has intervened in this case, and has filed an opposition to the motion to dismiss as well, asking the Court to uphold the constitutionality of the judicial review provisions of the Telecommunications Act of 1996. No oral hearing is necessary. *See* Local Rule 105.6 (D. Md.). For the reasons set forth below, the motion to dismiss will be GRANTED.

I. BACKGROUND

The Telecommunications Act of 1996 ("the 1996 Act") was enacted to promote competition in local telecommunications markets. Among their duties under § 251 of the 1996 Act, incumbent local exchange carriers such as Bell Atlantic must allow competing carriers to interconnect their facilities with the incumbent's network, and establish reciprocal compensation arrangements for the transport and termination of telecommunications.[1] 47 U.S.C. § 251(a) and (b). To fulfill their § 251 duties, the incumbents must negotiate in good faith with competing carriers terms and conditions of voluntary interconnection agreements. § 251(c)(1) and § 252(a). If these private negotiations fail, either party may petition the state commission to arbitrate open

[1] Reciprocal compensation works as follows: When a customer of Carrier A places a call to a customer of Carrier B in the same local area, Carrier A pays Carrier B for "terminating," or completing, that local call. Similarly, when a customer of Carrier B calls a customer of Carrier A within that same local area, Carrier B pays termination charges to Carrier A. *See* Pl.'s Opp'n at 8.

issues. § 252(b). Once a negotiated or arbitrated interconnection agreement is in place, the parties must submit it to the state commission for approval or rejection. § 252(e)(1). A state commission may reject an agreement adopted by negotiation only if the agreement "discriminates against a telecommunications carrier not a party to the agreement," or if "implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity." § 252(e)(2)(A). A party aggrieved by a state commission's determination under § 252 may seek review in a federal district court "to determine whether the agreement or statement meets the requirements of section 251 [and section 252]." § 252(e)(6).

Bell Atlantic entered into a voluntarily-negotiated interconnection agreement with MFS Intelenet of Maryland, Inc. ("MFS") on July 16, 1996, and the PSC approved that agreement on October 9, 1996. The other private defendants entered voluntary agreements in relevant part identical to the MFS agreement. Several months after the agreement was signed and approved, a disagreement arose over the interpretation of a provision regarding payment of reciprocal compensation that the parties had previously negotiated and agreed upon. That provision requires Bell Atlantic to pay reciprocal compensation for "local" calls. The parties disagree on whether calls to internet service providers (who then connect the callers to the internet) are "local."

In Count I, Bell Atlantic asserts that the PSC's conclusion in the Order—that under the agreements internet calls are local—is in direct conflict with the February 26, 1999, FCC declaratory ruling. In Bell Atlantic's view, the FCC ruling unequivocally held that calls connected to the internet are "interstate" calls, not local calls.

In Count II, Bell Atlantic asserts that the PSC erroneously interpreted the FCC declaratory ruling as *requiring* state commissions to impose reciprocal

compensation for internet calls where parties cannot agree on rules governing compensation for such traffic.[2] According to Bell Atlantic, as a result of that error, the PSC in the Order determined that carriers without current interconnection agreements would be required to pay reciprocal compensation rates for internet-bound calls on a temporary basis, until the FCC creates an inter-carrier compensation mechanism for such calls.

Bell Atlantic requests the following specific relief: that this Court issue an order (1) declaring the PSC's decision unlawful, (2) enjoining all defendants, and all parties acting in concert therewith, from seeking to enforce that unlawful decision against Bell Atlantic, (3) requiring the PSC and Commissioners to order defendant carriers to refund money obtained from Bell Atlantic in reciprocal compensation fees for internet traffic. Compl., at 13-14.

The PSC and Commissioners argue that Bell Atlantic's entire suit against them is barred by the Eleventh Amendment.[3] The opponents to the motion to dismiss argue that two exceptions to the Eleventh Amendment apply in this case: (1) constructive waiver, and (2) the case law doctrine established under *Ex parte Young*, 209 U.S. 123 (1908).[4] Additionally, the PSC

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[2] Although Bell Atlantic concedes that the declaratory ruling permits the PSC to require reciprocal compensation for internet calls, it contests the correctness of that ruling. That ruling has been challenged on appeal to the D.C. Circuit. *See* Pl.'s Mot. for Summ. J. at 21 n.9.

[3] Because the Court agrees with the PSC's Eleventh Amendment argument, it need not address the alternative argument of the PSC and Commissioners that this Court has no jurisdiction to review decisions of the PSC *enforcing* (as opposed to approving or rejecting) previously-approved interconnection agreements.

[4] Opponents to the motion to dismiss did not argue the third exception to the Eleventh Amendment, that Congress abrogated the states' Eleventh Amendment immunity in the 1996 Act. Likely the reason they did not so argue is because Congress does not have power under the commerce clause to abrogate the states' Eleventh Amendment immunity. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73

and Commissioners argue that Count II is not ripe for review; the opponents argue to the contrary.

II. DISCUSSION

A. *Eleventh Amendment*

The Eleventh Amendment protects an unconsenting state from suit in federal court by private parties. *See Hans v. Louisiana*, 134 U.S. 1 (1890).[5] A state's Eleventh Amendment immunity extends to state agencies, such as the PSC, and state officials, such as the Commissioners. *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993).

1. *Constructive Waiver*

The Court rejects the argument that the PSC has constructively waived its Eleventh Amendment immunity by participating in the regulatory scheme of the 1996 Act.[6] The Supreme Court recently repudiated the doctrine of constructive waiver. *See College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2230 (1999) ("constructive waiver is little more than abrogation under another name"). While some constructive waivers apparently survived *College Savings Bank*, Congress was permitted to extract those constructive waivers from the states only in a very limited context. *Id.* at 2231. When exercising

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(1996) ("The Eleventh Amendment restricts the Judicial Power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."). Congress does have such power, however, when acting under section 5 of the Fourteenth Amendment. *Id.* at 59 (affirming *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)).

[5] The Eleventh Amendment withdraws jurisdiction from the federal court: "the judicial power of the United States shall not . . . extend to any suit in law or equity. . . ." U.S. Const. amend. XI. This withdrawal effectively confers immunity from federal suit on the states, but, of course, allows them to be sued in their own courts.

[6] There is no contention that the PSC has *expressly* waived its immunity.

its spending power (granting federal funds to states[7]) or otherwise bestowing a gift (granting approval of an interstate compact[8]) to states, Congress was permitted to condition receipt of that gift on a waiver of immunity. *See College Sav. Bank*, 119 S. Ct. at 2231; *see also Litman v. George Mason Univ.*, No. 98-1742, 1999 WL 547910 (4th Cir. July 28, 1999) (upholding constitutionality of Title IX's constructive waiver clause as valid exercise of Congress's spending power and noting Congress may condition federal grant on state's waiver of Eleventh Amendment immunity).

The opponents' attempt to characterize the new "federal cooperative" in telecommunications competition as a "gift" to states is unavailing. In the 1996 Act, Congress stripped the states of the local power to regulate telecommunications that had been vested in them for decades (as Congress was entitled to do under the Commerce Clause). Some gift. It is beyond this Court's imagination how Congress's offer to the states to participate as regulators in the very federal scheme that divested them of their local power can be considered a "gift," and it is certainly not one that the states could freely decline to accept.[9] *See Wisconsin Bell, Inc. v. Public Serv. Comm'n of Wis.*, 57 F. Supp. 2d 710 (W.D. Wis. 1999) ("There is no arguable basis to a claim that equates a gift with a state's participation in the act's cooperative federalism."); *see also AT&T Communications v. BellSouth Telecommunications*, 43 F. Supp. 2d 593, 602 (M.D. La. 1999) ("Upon passage of the 1996 Act, the states were forced to either abide by

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[7] *See South Dakota v. Dole*, 483 U.S. 203 (1987).

[8] *See Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959).

[9] The Court agrees with the PSC that local telephone service is an area of traditional local concern to state commissions, and that the states have a strong interest in providing telecommunications services to citizens at competitive rates. So, when Congress moved into this area, it is doubtful that the PSC could have voluntarily declined the "gift."

the federal regulations or cede the power to regulate to the FCC—a classic Hobson's choice. The option of either consenting to federal regulation and waiving immunity or losing the previously held power to regulate a local exchange carrier is not a choice that this court sees as voluntary.").

In summary, in light of *College Savings Bank* and the Court's rejection of the argument that this case falls into the limited exception of waivers permitted post-*College Savings Bank*, the Court concludes that the PSC did not constructively waive its Eleventh Amendment immunity when it participated in the regulatory process under the 1996 Act.

2. *Ex parte Young*

Bell Atlantic next argues that it may bypass the Eleventh Amendment under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). That doctrine permits private individuals to sue state officers in federal court for prospective, injunctive relief for continuing violations of federal law. The Supreme Court, in essence, created a fiction in *Ex parte Young* to avoid the dictates of the Eleventh Amendment, for the purpose of vindicating the federal interest in assuring the supremacy of federal law. *See Green v. Mansour*, 474 U.S. 64, 68 (1985) ("the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause" but noting "compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment").

Unfortunately for the lower courts, it is far from clear when *Ex parte Young* relief is available; it is no surprise, therefore, that courts have gone both ways on whether it is available to review state commission determinations under the 1996 Act. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997) (observing that the "difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many

instances be that between day and night"). Indeed, from the case law it appears in many instances to be the difference between 12:00 and 12:01, if that.

The only federal circuit court to address whether *Ex parte Young* is available under the 1996 Act is the Sixth Circuit, which concluded that a case against state commissioners under the 1996 Act is a "straightforward *Ex parte Young* case." *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 186 F.3d 726, 731 (6th Cir. 1999). In reaching its conclusion, the Sixth Circuit undertook no analysis of whether *Ex parte Young* was an appropriate remedy under the 1996 Act; instead, the court simply stated that "the Seventh Circuit properly concluded that [*Seminole Tribe* and *Coeur d'Alene Tribe*] did not affect the application of *Ex parte Young* to § 252 cases" and the court "adopted the reasoning of the Seventh Circuit." *Id.* at 731-32 (citing *MCI Telecommunications Corp. v. Illinois Commerce Comm'n*, 168 F.3d 315, 321 (7th Cir. 1999)). But the trouble with going there (to the Seventh Circuit's reasoning), to quote Dorothy Parker (although not a legal scholar, a noted wit), "is that when you get there, there is no there, there." When one actually reads the Seventh Circuit's opinion in *MCI*, one discovers that it did not decide the *Ex parte Young* issue. *See MCI*, 168 F.3d at 323 n.3 ("Because we have decided that the state authorities waived their Eleventh Amendment immunity, we need not address whether the doctrine of *Ex parte Young* affords an alternate basis for holding that the Eleventh Amendment does not bar this action.").[10] Thus, this Court does not find the Sixth Circuit's decision of any worth on the issue of whether *Ex parte Young* relief is available under the 1999 Act.

In *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), the Supreme Court restricted use of the

[10] The Seventh Circuit granted a rehearing on its constructive waiver holding in light of *College Sav. Bank. MCI Telecommunications Corp. v. Illinois Commerce Comm'n*, 183 F.3d 567 (1999).

doctrine of *Ex parte Young*, and ruling it out where a court can infer that Congress did not intend the federal court to provide traditional *Ex parte Young* injunctive relief. One way to infer whether Congress intended that such relief be available is to review the remedial scheme Congress provided. If Congress provided an alternative, specific form of relief to enforce compliance with a particular statute, especially a limited form of relief, it is likely that Congress did not intend *Ex parte Young* relief. *Seminole Tribe*, 517 U.S. at 74.

Here, the statute provides, "In any case in which a State commission makes a determination under [section 252], any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine *whether the agreement or statement [of generally available terms] meets the requirements of § 251 [and § 252]*." § 252(e)(6) (emphasis added). This review provision authorizes only limited review of determinations by state commissions to ensure that agreements or statements meet federal requirements, whereas an *Ex parte Young* action against individual commissioners, would expose them "to the full remedial powers of a federal court, including, presumably, contempt sanctions." *See Seminole Tribe*, 517 U.S. at 75. While the remedial scheme in the 1996 Act is not as intricate as the remedial scheme in the statute at issue in *Seminole Tribe*, it nevertheless specifically limits the scope of the federal court review available (and thus the relief the Court may provide), suggesting that Congress did not intend an *Ex parte Young* action against the Commissioners. *See Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) ("When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for [] violations that may occur in the course of its administration, we have not created additional . . . remedies." *See AT&T Communications*, 43 F. Supp. 2d at 602 ("The 1996 Act provides a remedial scheme which limits the type of judicial remedy available."); *Wisconsin Bell, Inc. v. Public Serv. Comm'n*, 27 F. Supp. 2d 1149,

1160 (W.D. Wis. 1998) ("Congress is a superior legislator to the courts and its choice of remedy must be respected.").

Another way to infer whether Congress wanted an *Ex parte Young* action to survive against the Commissioners[11] is to review the language that Congress used in the 1996 Act.[12] *See Seminole Tribe*, 517 U.S. at 75 n.17 (noting Congress's exclusive reference to "the State" in statute and contrasting statutes where Congress referred to individual state officials). Here Congress chose the words "State commission" in the judicial review provision,[13] and nowhere in § 251 or § 252 does Congress refer to individual state commissioners. The language that Congress selected militates against finding that Congress intended an *Ex parte Young* action to exist against individual state commissioners in the 1996 Act.

In all likelihood, Congress, writing the 1996 Act prior to the *Seminole Tribe* and *College Sav. Bank* decisions, intended to abrogate states' Eleventh Amendment immunity or to extract constructive waivers from the states; but it is now clear that Congress had no such power. *See Seminole Tribe*, 517 U.S. 44; *College*

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[11] It is perplexing to contemplate how Bell Atlantic can sue the two Commissioners who dissented from the Order (and, thus, presumably in Bell Atlantic's view are in compliance with federal law), or how Bell Atlantic can sue the one Commissioner who did not even participate in the Order (defendant Riley), having been appointed after the Order was issued. Making such individuals defendants is one of the absurdities associated with the *Ex parte Young* fiction.

[12] The judicial review provision, section 252(e)(6) titled "Review of State commission actions," provides in pertinent part:

> . . . In any case in which a State commission makes a determination under this section, any party aggrieved by such de-termination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

[13] By the PSC's count, § 252 alone refers to "state commission" 45 times. PSC Reply at 14.

Sav. Bank, 119 S. Ct. 2219. This Court is not empowered to redraft the statute. *See Seminole Tribe*, 517 U.S. at 76 (noting court is not "free to rewrite the statutory scheme in order to approximate what we think Congress might have wanted had it known that [making the state suable in federal court] was beyond its authority").[14]

In short, this Court cannot recognize an implied cause of action against the Commissioners under *Ex parte Young*, because the Court infers from the 1996 Act that Congress did not authorize such federal jurisdiction. Instead, this Court decides the Eleventh Amendment issue in concurrence with the two published cases that have held that an *Ex parte Young* action against state commissioners is unavailable under the 1996 Act. *See Wisconsin Bell*, 57 F. Supp. 2d 710 (holding state commission entitled to Eleventh Amendment immunity and rejecting use of constructive waiver doctrine or *Ex parte Young* doctrine in context of 1996 Act); *AT&T Communications*, 43 F. Supp. 2d 593 (same).[15]

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[14] Whether Congress intended that *Ex parte Young* relief be available under the 1996 Act is one of many uncertain aspects of the 1996 Act (due to its poor draftsmanship). *See AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999) (Scalia, J.) ("It would be gross understatement to say that the Telecommunications Act of 1996 is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction. That is most unfortunate for a piece of legislation that profoundly affects a crucial segment of the economy worth tens of billions of dollars.").

[15] The Court recognizes that other courts have concluded to the contrary. In addition to the Sixth Circuit case mentioned in the text, the following published cases have permitted *Ex parte Young* actions against state commissioners (only two of which discuss *Seminole Tribe*'s restriction of *Ex parte Young*): *Indiana Bell Tel. Co., Inc. v. McCarty*, 30 F. Supp. 2d 1100 (S.D. Ind. 1998); *Michigan Bell Tel. Co. v. MFS Intelenet of Michigan, Inc.*, 16 F. Supp. 2d 817 (W.D. Mich. 1998); *MCI Telecommunications Corp. v. BellSouth Telecommunications*, 9 F. Supp. 2d 766 (E.D. Ky. 1998); *US West Communications, Inc. v. MFS Intelenet, Inc.*, 35 F. Supp. 2d 1221 (D. Ore. 1998); *US West Communications, Inc. v. Public Serv. Comm'n*, 991 F. Supp. 1299 (D. Utah 1998).

Having found that neither the constructive waiver doctrine nor the *Ex parte Young* doctrine is available under the 1996 Act, the Court concludes that the Eleventh Amendment bars this suit against the PSC and Commissioners.

3. *Remaining Defendants*

The PSC, in its motion to dismiss, argued that it is an indispensable party under Fed. R. Civ. P. 19 and that, therefore, the suit cannot proceed in its absence. The joint opponents[16]—but not plaintiff Bell Atlantic[17]—argue that this case may proceed without the PSC. Having considered and weighed the four factors set forth in Fed. R. Civ. P. 19(b)[18] to determine whether the PSC is indispensable, the Court concludes that the PSC is indeed an indispensable party in this case; therefore, this suit cannot proceed without it.

The joint opponents downplay the effect that going forward without the PSC would have on the PSC, but

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Though those in favor outnumber those against, decisions of an issue of such magnitude is not a simple matter of counting courts, but of independent analysis, especially where delicate matters of federal power are at issue. Such, indeed, was the situation before the Supreme Court invalidated the Religious Freedom Restoration Act of 1993 in *City of Boerne v. Flores*, 521 U.S. 507 (1997), when only a few courts (including this one) had ruled the statute unconstitutional, though many had endorsed it.

[16] MFS Intelenet of Maryland, Inc., MCIMETRO Access Transmission Services LLC and TCG Maryland, Inc.

[17] Bell Atlantic had the opportunity to brief the indispensable party issue, because the PSC raised the issue in its motion to dismiss, but Bell Atlantic did not address the issue in its opposition motion.

[18] Under Rule 19(b), the Court must weigh four factors: (1) to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; and (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

proceeding without the PSC would severely prejudice the PSC. In fact, the Court cannot give Bell Atlantic any of the relief it requests without first declaring the PSC's Order invalid and unlawful, implicating the very sovereign immunity concerns that protect the PSC from suit in the first instance: respect for the state's dignity and autonomy. A federal court's declaration that a state agency's order is unlawful could cripple that agency's effectiveness and independence. *See AT&T Communications*, 43 F. Supp. 2d at 603 (noting that declaration that state commission's actions violate 1996 Act would result in disrespect for state autonomy in decision-making). *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984) (a suit against the state is one where "the judgment sought would . . . interfere with the public administration . . . or restrain the Government from acting, or to compel it to act") (internal citations omitted); *Fluent v. Salamanca Indian Lease Authority*, 928 F.2d 542, 548 (2d Cir.) (presence of sovereign immunity is "compelling" factor under Rule 19(b)), *cert. denied*, 502 U.S. 818 (1991). Also, the Court does not believe it can tailor any adequate remedy to avoid or minimize the prejudice to the PSC.

And, although it may appear that Bell Atlantic would have no adequate relief if the case is dismissed, Bell Atlantic is not precluded from seeking relief in state court, by this Court's interpretation of the 1996 Act. Concurrent state court jurisdiction will be denied only "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." *Tafflin v. Levitt*, 493 U.S. 455, 459-460 (1990) (internal citations omitted). None of these requirements is met here. By the plain meaning of the purported exclusive jurisdiction provision in the 1996 Act, there is no exclusive federal jurisdiction over the complaint in this case, because Bell Atlantic is not seeking review "of a State commission in approving or rejecting an agreement under this section." *See*

§ 252(e)(4); *see also Washington Public Interest Research Group v. Pendleton Woolen Mills*, 11 F.3d 883, 886 (9th Cir. 1993) ("The most persuasive evidence of . . . [congressional] intent is the words selected by Congress.") (internal citations omitted). Indeed, Bell Atlantic initially sought relief from a related PSC order (issued prior to the FCC declaratory ruling) in the Circuit Court for Montgomery County, which affirmed the PSC's conclusion that the agreement meant that Bell Atlantic must pay reciprocal compensation for calls to internet service providers.

Finally, even if Congress intended that § 252(e)(4) have such broad reach as to preclude state court review of suits such as the one presently before the Court, such provision must be invalidated because the Court may infer that Congress would have intended state court review, had it known the judicial review provision it enacted in § 252(e)(6) would be ineffectual. *See Tafflin*, 493 U.S. at 459-460 (noting strong presumption in favor of concurrent state court jurisdiction). *See* Bell Atlantic's Opp'n at 20 ("There can be no doubt that Congress would not have authorized States to wield federal regulatory authority if their actions were not subject to judicial review.").

B. *Ripeness Doctrine*

Count II must be dismissed on the alternative ground that it is not ripe for judicial review. In Count II, Bell Atlantic alleges that "the PSC's decision to require reciprocal compensation for Internet traffic in instances where the parties cannot agree on the rules governing compensation for such traffic violates federal law. . . ." Compl. at 13. Bell Atlantic requests that the Court declare the PSC's decision unlawful and enjoin defendants, and all parties acting in concert with them, from seeking to enforce it against Bell Atlantic. *Id.*

Article III of the Constitution limits the judicial power of the federal courts to the resolution of actual cases or controversies. *Gasner v. Bd. of Supervisors of*

the County of Dinwiddie, Va., 103 F.3d 351, 361 (4th Cir. 1996). U.S. Const. art. III, § 2, cl. 1. *See also* 28 U.S.C. § 2201. An actual controversy exists in a case challenging administrative action only when "an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Charter Fed. Sav. Bank v. Office of Thrift Supervision*, 976 F.2d 203, 208 (4th Cir. 1992), *cert. denied*, 507 U.S. 1004 (1993) (quoting *Pacific Gas & Elec. Co. v. Energy Resources Comm'n*, 461 U.S. 190, 200 (1983)). A claim is not ripe where the plaintiff has not "suffered any injury thus far and the future effect of the [Order] remains wholly speculative." *Gasner*, 103 F.3d at 361.

In determining whether a claim is ripe for adjudication, a court evaluates two factors: (1) whether the issues are fit for judicial decision; and (2) whether hardship will fall to the petitioning party on withholding court consideration. *Charter Fed.*, 976 F.2d at 208 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). A claim is fit for judicial decision where the question presented is a "purely legal one [] and where the agency rule or action giving rise to the controversy is final and not dependent upon future uncertainties or intervening agency rulings." *Charter Fed.*, 976 F.2d at 208. The hardship factor is measured by "the immediacy of the threat and the burden imposed on the petitioner who would be compelled to act under threat of enforcement of the challenged law." *Id.* at 208-09. Applying these principles to Count II, the Court holds that the claim is not ripe for review.

As to *Abbott*'s first factor, fitness of the issues for judicial decision, several future uncertainties could affect the case, and intervening rulings might be issued. First, Bell Atlantic might negotiate its own terms for whether reciprocal compensation is required for internet calls, without regard to the Order. *See* the Order at 17 ("The parties are of course free to negotiate another compensation rate to be applied to ISP-bound traffic."). Second, the PSC might change its decision in

the context of actual agreements. *See GTE North Inc. v. McCarty*, 978 F. Supp. 827, 836 (N.D. Ind. 1997) ("state commissions are unable to rule with finality on issues addressed by their own orders until they have seen how those issues function, both economically and pragmatically, in the context of a completed agreement . . . That observation supports this court's view that a state commission might change its mind once it reviews a completed agreement."). The PSC has emphasized that the Order is an "interim" and "temporary" one, meant to exist only until the FCC resolves the matter. Finally, the question of whether a state commission is permitted to require reciprocal compensation for internet-bound calls, absent a voluntary agreement, is on review before the D.C. Circuit; oral argument is scheduled for November 1999. *See Bell Atlantic Tel. Cos. v. FCC*, No. 99-1094 (D.C. Cir.). *See* Pl.'s Mot. for Summ. J. at 21 n.9. If that question is answered in the negative, in all likelihood the PSC would rescind part two of its Order, given that it was based on its reading of that FCC ruling.

As to *Abbott*'s hardship factor, Bell Atlantic's complaint does not allege any particular harm, nor does there appear to be an immediacy of a threat to enforce the Order. *See AT&T Corp.*, 525 U.S. 366 (noting that where "no immediate effect on Plaintiff's primary conduct, federal courts normally do not entertain pre-enforcement challenges to agency rules and policy statements"). The Order affects parties that do not have interconnection agreements, after lengthy arbitration proceedings occur. The Court declines to base its jurisdiction on what might or might not occur in future arbitration proceedings. The better course is that any injury that might occur from the Order in future arbitration proceedings be challenged by seeking judicial review once an arbitrated agreement is in place. In sum, applying the *Abbott* test, the Court believes review of the claim in Count II—that the PSC may incorporate a term requiring reciprocal compensation payment for internet bound calls in *future*

agreements between Bell Atlantic and as yet *unnamed* parties—at this time would be premature.

Moreover, the Court agrees with the PSC that Count II is not ripe for review under § 252(e)(6), because that section permits federal court review of interconnection agreements or statements of generally available terms, and Bell Atlantic, in Count II, does not seek review of either. *See, e.g., MCI Telecommunications v. Frisby*, 998 F. Supp. 625 (D. Md. 1998) (noting that claim is not ripe for review absent interconnection agreement); *GTE North Inc.*, 978 F. Supp. 827 (same). Bell Atlantic admits that no agreement is in place for its Count II claim, but argues that an approved statement of generally available terms ("SGAT") makes the claim ripe for review under § 252(e)(6). In an attempt to bring its claim within the scope of § 252(e)(6) review, Bell Atlantic frames the PSC's determination of which it seeks judicial review as an "interpretation of Bell Atlantic's obligations under its existing SGAT." Bell Atlantic Opp'n at 31. A tangential reference to a SGAT, however, does not bring the claim within the ambit of § 252(e)(6) review.

The core issue that Bell Atlantic wants this Court to review is the PSC's decision that parties that do not have agreements will be required to pay reciprocal compensation for Internet traffic; the decision does not affect the SGAT or the scope of Bell Atlantic's obligations thereunder. The previously-approved SGAT (which presumably Bell Atlantic itself submitted for approval to the PSC) simply provides the compensation rates that will apply when and if the PSC enforces its ruling. Thus, the determination of the PSC for which Bell Atlantic seeks review, being totally independent from the PSC's approval of the SGAT, is not ripe for § 252(e)(6) review until an interconnection agreement is in place.

Even if the claim in Count II were ripe, the Court, in the exercise of its discretion over declaratory judgment actions, will decline such jurisdiction for the same

reasons set forth in the ripeness discussion, *supra*. *See* 28 U.S.C. § 2201; *see Charter Fed.*, 976 F.2d at 208-09. *See also Public Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 243 (1952) (noting federal courts must not assert jurisdiction over declaratory judgment actions "through obtaining futile or premature interventions, especially in the field of public law").

C. *Section 1331 Jurisdiction*

Bell Atlantic also argues that if the Court does not have jurisdiction under § 252(e)(6), that the Court has independent jurisdiction under 28 U.S.C. § 1331. Even if this Court were willing to recognize an independent federal cause of action under § 1331 (which it is not), Bell Atlantic would have to contend with the Eleventh Amendment, discussed *supra*, which is a "real limitation on a federal court's federal-question jurisdiction." *See Coeur d' Alene*, 521 U.S. at 270. *See MCI Telecommunications*, 998 F. Supp. 625 (holding § 1331 and *Ex parte Young* unavailable to bypass Eleventh Amendment absent jurisdiction under § 252(e)(6)).

III. CONCLUSION

For the foregoing reasons, this Court concludes that this suit against the PSC and the Commissioners is barred by the Eleventh Amendment. In addition, the Court concludes that Count II is not ripe for review, and the Court in the exercise of its discretion under § 2201 does not believe review of Count II is proper at this time. The Court also concludes that the PSC is an indispensable party. Accordingly, this Court lacks subject matter jurisdiction, and the Court will GRANT the motion to dismiss of the PSC and the Commissioners. An appropriate order will be entered separately.

Dated: October 20, 1999

/s/ Frederic N. Smalkin
Frederic N. Smalkin
United States District Judge

APPENDIX C

STATE OF MARYLAND
PUBLIC SERVICE COMMISSION

Case No. 8731

IN THE MATTER OF THE COMPLAINT OF MFS INTELNET OF MARYLAND, INC. AGAINST BELL ATLANTIC-MARYLAND, INC. FOR BREACH OF INTERCONNECTION TERMS AND REQUEST FOR IMMEDIATE RELIEF

Order No. 75280

[June 11, 1999]

I. INTRODUCTION

This matter comes before the Commission pursuant to a Petition of Bell Atlantic-Maryland, Inc. ("BA-MD") for Declaratory Order that Internet Traffic is not "Local" Traffic Subject to Reciprocal Compensation ("Petition"). Specifically, BA-MD seeks an order declaring that, pursuant to the February 25, 1999 Federal Communications Commission ("FCC") Order,[1] and under the terms of BA-MD's interconnection agreements, calls from BA-MD's network to Internet Service Providers ("ISPs") served by interconnecting carriers do not constitute local traffic subject to reciprocal compensation. By Letter Order dated March 17, 1999, the Commission requested that parties file comments on BA-MD's petition by March 29, 1999.

[1] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Declaratory Ruling, CC Docket 96-96 (rel. February 26, 1999) ("ISP Order").

The Commission received comments from fifteen parties.[2] BA-MD filed a letter response to these comments on March 31, 1999 and filed a more extensive response on April 6, 1999. On April 14, 1999, the Commission heard oral argument during its weekly administrative meeting.

II. BACKGROUND

On February 8, 1996, President Clinton signed into law the Telecommunications Act of 1996 ("1996 Act"), which establishes a framework for opening the local telephone markets to competition.[3] In order to promote competition in the local exchange telecommunications market, the 1996 Act imposes a general duty on all telecommunications carriers to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. 47 U.S.C. §251(a). With regard to incumbent local exchange carriers ("ILECs") such as BA-MD, the duty to interconnect is even more specifically defined by Section 251(c)(2).

In conjunction with the above-mentioned interconnection obligations, the 1996 Act requires all local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of telecommunications. 47 U.S.C. §251(b)(5). For purposes of compliance with this subsection, the 1996 Act provides that a State commission shall not consider the terms and conditions for reciprocal compensation to be just

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[2] Parties filing comments included AT&T, Commission Staff, MCI Worldcom, Global NAPS South, Inc., Office of People's Counsel, Starpower Communications, Inc., Focal Communications Corporation, KMC III Telecom, Inc., Choice One Communications, Inc., Sprint Communications Company L.P., Prism Operations LLC, Intermedia Communications, Inc., e.spire Communications, Inc., Association for Local Telecommunications Services, and Conectiv Communications, Inc.

[3] *See*, 47 U.S.C. §§251-261. The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), is codified throughout title 47 of the United States Code. References to the 1996 Act are to the relevant sections of the Code.

and reasonable unless such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier. Further, such terms and conditions must determine costs on the basis of a reasonable approximation of the additional costs of terminating such calls. 47 U.S.C. §252(d)(2)(A). However, it should be noted that ILECs may negotiate and enter into a binding agreement with a requesting telecommunications carrier without regard to the standards set forth in Sections (b) and (c) of §251. 47 U.S.C. §252(a)(1).

The procedures for negotiations between Competitive Local Exchange Carriers ("CLECs") and ILECs are governed by §252 of the Act. If negotiating companies cannot reach agreement, §252 provides that the parties may request that the appropriate State commission arbitrate unresolved issues. Each interconnection agreement must be submitted to the State commission for approval, regardless of whether the agreement was negotiated by the parties or arbitrated, in whole or part, by the State commission. 47 U.S.C. §252(e)(1). However, the State commission may only reject a negotiated agreement if it finds that the agreement or a portion thereof discriminates against a telecommunications carrier not a party to the agreement, or the implementation of such an agreement is not consistent with the public interest, convenience and necessity. 47 U.S.C. §252(e)(2)(A).

The issue of the correct treatment of ISP-bound traffic first arose in Maryland when MFS Intelenet of Maryland, Inc. ("MFS") filed a complaint requesting that we enforce the reciprocal compensation provisions of the interconnection agreement between MFS and BA-MD. ("MFS agreement"). MFS is a local exchange carrier providing telephone services in various regions of Maryland in competition with BA-MD. On July 16, 1996, MFS and BA-MD entered into an interconnection

agreement under §§251 and 252 of the 1996 Act. Among other things, the MFS agreement contains terms addressing provision of interconnection and reciprocal compensation between the parties. Pursuant to §252 of the 1996 Act, the MFS agreement was filed with the Commission and we approved the agreement on October 9, 1996.[4] Pursuant to the MFS agreement, MFS and BA-MD exchange traffic between their respective networks, so that a customer subscribing to MFS' local exchange service can place calls to customers subscribing to BA-MD's local exchange service, and vice versa. Both MFS and BA-MD provide local exchange services over their respective networks to end use customers, including some business customers operating as ISPs.

On April 28, 1997, nine months after entering into the MFS agreement and six months after we approved that agreement, BA-MD sent a letter to MFS stating that it intended to discontinue payments of reciprocal compensation for local exchange traffic terminating to ISPs. In its letter, BA-MD claimed that local exchange traffic delivered to ISPs was ineligible for reciprocal compensation and stated that BA-MD intended to withhold reciprocal compensation payments for traffic BA-MD believed may be delivered to ISPs. BA-MD further indicated that it would seek refund of money previously paid as compensation for such calls.

On May 21, 1997, MFS filed a complaint with the Commission alleging that the actions of BA-MD violated the 1996 Act and the MFS agreement. Specifically, MFS alleged that BA-MD's actions were contrary to the plain language of the MFS agreement. According to MFS, Sections 1.44 and 1.61 of the MFS agreement

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[4] *In the Matter of the Petitions for Approval of Agreements and Arbitration of Unresolved Issues Arising Under Section 252 of the Telecommunications Act of 1996*, Case No. 8731, Phase(a), Order No. 72939, 87 Md. PSC 210 (Oct. 9, 1996).

established the parameters for reciprocal compensation between MFS and BA-MD. These sections state:

> 1.44 "Local Traffic" means traffic that is originated by a Customer of one Party on that Party's network and terminates to a Customer of the other Party on that other Party's network, within a given local calling area, or expanded area service ("EAS") area, as defined in BA's effective Customer tariffs. Local Traffic does not include traffic originated or terminated by a commercial mobile radio service carrier.
>
> 1.61 "Reciprocal Compensation" is As Described in the Act, and refers to the payment arrangements that recover costs incurred for the transport and termination of Local Traffic originating on one Party's network and terminating on the other Party's network.

MFS contended that pursuant to these provisions, to the extent an ISP purchases local exchange service from MFS and receives calls which originate from users of BA-MD provided local exchange service, BA-MD is obligated to pay reciprocal compensation to MFS for termination of such calls. MFS requested that the Commission declare the MFS agreement's reciprocal compensation provisions fully applicable to calls that terminate at ISPs. On July 2, 1997, BA-MD responded to the MFS complaint. In its response, BA-MD contended that ISP traffic is interstate and the Commission should leave the determination of what compensation is due to the FCC.

On September 11, 1997, we released our Letter Order in response to the MFS complaint. In this Order, we noted that "the primary issue presented is resolvable pursuant to the terms of the BA-MD/MFS

Interconnection Agreement."[5] We accordingly found that MFS was entitled to compensation for the transport and termination of ISP-bound telephone calls. BA-MD's Petition for Reconsideration of the MFS Order was subsequently denied by the Commission.[6]

We considered this issue a second time within the context of a Sprint Communications Company, LP ("Sprint") complaint. On December 2, 1998, Sprint filed a Motion for Resolution of Disputed Issue. This motion was filed in response to BA-MD's refusal to sign an interconnection agreement unless it stated that Internet traffic is not local and not subject to reciprocal compensation. Sprint sought a Commission ruling on how ISP-bound calls should be treated. Basically, Sprint wanted the Commission to find that ISP-bound traffic was local and therefore, subject to reciprocal compensation. After consideration of the comments filed by Sprint, BA-MD and Staff, the Commission concluded that ISP-bound calls "are classified as local in nature and are therefore, subject to reciprocal compensation" from BA-MD.[7]

On February 26, 1999, the FCC released its Order clarifying the jurisdictional status of calls to ISPs.[8] The FCC concluded that "ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate."

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[5] Letter from Daniel P. Gahagan, Executive Secretary, Maryland Public Service Commission, to David K. Hall, Bell Atlantic-Maryland, Inc. and Andrew D. Lipman, Swidler & Berlin, Chg. (Sept. 11, 1997). ("MFS Order").

[6] Letter from Daniel P. Gahagan, Executive Secretary, Maryland Public Service Commission, to David K. Hall, Bell Atlantic-Maryland, Inc. (Oct. 1, 1997).

[7] Letter from Felecia L. Greer, Executive Secretary, Maryland Public Service Commission, to David K. Hall, Bell Atlantic-Maryland, Inc. and Cathy Thurston, Sprint Communications Company L.P. (Feb. 9, 1999) ("Sprint Order").

[8] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Declaratory Ruling, CC Docket 96-96 (rel. February 26, 1999) ("ISP Order").

However, the FCC further concluded that given the absence of a "federal rule regarding the appropriate inter-carrier compensation mechanism for this traffic, that parties should be bound by their existing interconnection agreements, as interpreted by state commissions."[9] Thus, the FCC permitted states which have treated ISP-bound traffic as local under interconnection agreements to continue to require ILECs to compensate CLECs under contractual principles or other legal or equitable considerations.[10]

III. DISCUSSION

BA-MD's argument essentially is that because the FCC has determined that ISP-bound calls are largely interstate in nature, BA-MD can no longer be required to provide reciprocal compensation under its interconnection agreements because reciprocal compensation only applies to local traffic. If the finding that ISP-bound traffic is largely interstate was all that the FCC had decided, BA-MD's contention probably would be correct.

However, the FCC also went on to state that this conclusion is not dispositive of interconnection disputes currently before state commissions.[11] The FCC noted that, since 1983, the FCC itself has treated ISP-bound traffic as though it were local.[12] "In addition, ILECs characterized expenses and revenues associated with ISP-bound traffic as intrastate for separations purposes."[13] The FCC found that "[A]gainst this backdrop, and in the absence of any contrary [FCC] rule, parties entering into interconnection agreements may reasonably have agreed, for purposes of determining whether

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[9] *Id.*, at para. 1. See, also, para. 22.

[10] *Id.*, at para. 27.

[11] *ISP Order*, at para. 20.

[12] *Id.*, at para. 23.

[13] *Id.*

reciprocal compensation should apply to ISP-bound traffic, that such traffic should be treated in the same manner as local traffic."[14] Thus, the clarification of the jurisdictional issue was not the FCC's only holding.

The FCC took the opportunity to issue some subsidiary conclusions. First, the FCC made clear that its jurisdictional determination did not in itself establish whether reciprocal compensation is due in any particular instance. The FCC recognized that parties might have agreed to reciprocal compensation for ISP-bound traffic, or a State commission exercising its authority under §§251 and 252 of the 1996 Act might have imposed reciprocal compensation obligations for this traffic.

The FCC developed a list of factors State commissions should consider when construing interconnection agreements to determine whether the parties agreed that ISP-bound calls should be treated as local at the time the contract was entered into. These factors include:

1. negotiation in the context of the FCC's longstanding policy of treating ISP traffic as local;
2. the conduct of the parties pursuant to those agreements;
3. whether ILECS serving ISPs have done so out of intrastate or interstate tariffs;
4. whether revenues associated with those services were counted as intrastate or interstate revenues;
5. whether there is evidence that ILECs or CLECs made any effort to meter this traffic or otherwise segregate it from local traffic, particularly for the purpose of billing one another for reciprocal compensation; and

[14] *Id.*, at para. 24.

6. whether, if ISP traffic is not treated as local and subject to reciprocal compensation, ILECs and CLECs would be compensated for this traffic.

While many of these factors constitute nothing more than an ILEC following established FCC procedures, the factors demonstrate that at the time the interconnection agreements were entered into, ISP-bound traffic was consistently treated as if it were local. Thus, if any of the ILECs wanted to change the prevailing view for purposes of reciprocal compensation negotiations, the companies were obligated to raise this issue during negotiations. Silence on the issue would logically be construed as accepting the prevailing treatment for ISP-bound traffic.

Furthermore, the FCC also found that even where parties to interconnection agreements do not voluntarily agree on an inter-carrier compensation mechanism for ISP-bound traffic, "State commissions may determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic."[15] According to the FCC, because no current rule exists on this specific issue, State commissions have had "no choice but to establish an inter-carrier compensation mechanism and to decide whether and under what circumstances to require the payment of reciprocal compensation."[16]

Clearly, the FCC's interpretation of the 1996 Act is that, in view of the absence of FCC rule to the contrary, State commissions have authority to decide whether ILECs and CLECs intended to treat ISP-bound traffic as local when they negotiated their agreements. If the parties did, then the State commissions have authority to require that such intention be honored. Moreover, the FCC's ruling is that State commissions have

[15] *Id.*, at para. 25.

[16] *Id.*, at para. 26.

authority in arbitration proceedings to require that reciprocal compensation be paid even if the parties do not agree.

Our ISP decisions have taken two different tracks. In the MFS decision, the Commission concluded that, under contract principles, pursuant to the interconnection agreement between the parties, MFS was entitled to compensation for termination of calls to ISPs. In this decision, we did not make a determination as to the jurisdictional nature of calls to ISPs. We concluded that the parties intended for ISP calls to be local. In contrast, in the Sprint decision, the Commission did address the jurisdictional nature of calls to ISPs and concluded that these calls were local. Since we find that a different analysis should be applied in the context of an approved negotiated interconnection agreement as opposed to an arbitration order, we will separately discuss whether CLECs should receive reciprocal compensation for ISP-bound traffic under each of these scenarios.

A. Approved Negotiated Interconnection Agreements

The primary issue in this context is relatively straightforward. We must determine whether the parties to the approved interconnection agreements intended, at the time those agreements were entered into, to treat ISP-bound telephone calls as local traffic subject to the payment of reciprocal compensation.[17] First, we must focus on the actual language of the interconnection agreement under review. We begin our assessment with a review of the provisions which define local traffic and address the reciprocal compensation obligations of BA-MD and MFS. The terms and conditions of the MFS agreement which define local

[17] Under well-established principles of contract construction, the parties' intent is determined at the time of contracting, not at some subsequent date. See, e.g., *Hardy v. Brookhart*, 259 Md. 317, 326-27 (1970).

traffic are found in Section 1.44 of the original agreement executed between MFS and BA-MD on July 16, 1996. This section states:

> 1.44 "Local Traffic" means traffic that is originated by a Customer of one Party on that Party's network and terminates to a Customer of the other Party on that other Party's network, within a given local calling area, or expanded area service ("EAS") area, as defined in BA's effective Customer tariffs. Local Traffic does not include traffic originated or terminated by a commercial mobile radio service carrier.

Also under review are the provisions addressing the reciprocal compensation obligations of both BA-MD and MFS. Section 1.61 reflects the mutual agreement of the parties, and that subsection reads in pertinent part:

> 1.61 "Reciprocal Compensation" is As Described in the Act, and refers to the payment arrangements that recover costs incurred for the transport and termination of Local Traffic originating on one Party's network and terminating on the other Party's network.

At the time the interconnection agreement was entered into, ISP traffic was treated as local in virtually every respect by all industry participants, including the FCC. BA-MD was fully aware of the industry's prevailing local treatment of ISP traffic at the time that it entered into the interconnection agreement in question. In fact, BA-MD afforded ISP traffic local treatment in the same respect that the CLECs did at the time. Thus, at the time the interconnection agreement was entered into, the prevailing local treatment of ISP traffic already was in place. Even today, both BA-MD and the CLECs charge their ISP customers local business line rates for local telephone exchange service that enables the ISP's customers to access their service via a local call. The service provided to ISP

customers by both BA-MD and CLECs falls under their local exchange tariffs and calls to ISPs are rated and billed just as any other local calls. Neither BA-MD nor the CLEC assesses toll charges for those calls. Further indication of the prevailingly local treatment afforded ISP traffic is the fact that BA-MD records the minutes of use associated with such calls as local for ARMIS reporting requirements with the FCC. Finally, BA-MD characterizes expenses and revenues associated with ISP-bound traffic as intrastate for jurisdictional separation purposes.

Even the FCC noted in its *ISP Order* that since 1983, it has treated ISPs as end users under the access charge regime and permitted them to purchase their links to the public switched telephone network through intrastate business tariffs rather then through interstate access tariffs. The FCC specifically recognized that it has, by the actions in that regard, discharged its interstate regulatory obligations through the application of local business tariffs and has thus treated ISP-bound traffic as though it were local.

Perhaps the most persuasive evidence that BA-MD did not intend to exclude calls to ISPs from the definition of local traffic is found in the conspicuous absence of a mechanism to track, separate and exclude ISP traffic from the local billing records of the CLECs. BA-MD certainly was in a position to know that such a mechanism would be necessary to segregate ISP traffic from local calls, yet no attempt was ever made to develop and incorporate such a mechanism.[18] Although BA-MD was well aware of the existence of ISP traffic at the time the MFS agreement was negotiated, it made no

[18] In conjunction with the prevailing local treatment afforded ISPs, BA-MD's actions immediately subsequent to executing the agreement evidence an intent to treat ISP-bound calls as local traffic. After our approval of the MFS agreement, MFS and BA-MD began operating under its terms and for many months, paid one another the agreed upon local compensation rates for the transport and termination of calls, including ISP-bound calls.

effort to exclude calls to ISPs from the definition of local traffic, but did expressly exclude commercial mobile radio service traffic. In contrast, there is no indication that the MFS agreement contemplated the segregation of ISP traffic, either as toll or as a "unique" form of local traffic.

Based on the foregoing, and recognizing the prevailing local treatment of ISP traffic at the time the agreement was executed, we conclude that the regulatory and industry custom at that time dictated that ISP traffic be treated as local, and therefore, subject to reciprocal compensation. We find that the treatment of ISP traffic as local was so prevalent in the industry at that time that BA-MD, if it so intended, had an obligation to negate such local treatment in the interconnection agreements it entered into by specifically excluding ISP traffic from the definition of local traffic subject to the payment of reciprocal compensation.

Given the comprehensive nature of the MFS agreement and the specificity with which they address virtually all interconnection issues, we find it difficult to understand how BA-MD could fail to insist on a specific itemized exception excluding ISP traffic. BA-MD's knowledge of that regulatory and industry custom made it imperative that BA-MD specifically exclude calls to ISPs from the definition of local traffic subject to the payment of reciprocal compensation.[19] Given the circumstances then existing, we find the absence of such a specific exclusion or exception to be persuasive of the fact that BA-MD did not intend to exclude ISP traffic from the definition of local traffic when it entered into the MFS agreement. Under all of the circumstances existing at the time the contract was entered into, we conclude that the parties contemplated

[19] It should be noted that, unless a contract provides otherwise, the law applicable at the time and place the contract is entered into is to be considered a part of that contract. See, e.g., *Denice v. Spotswood I. Quinby, Inc.*, 248 Md. 428, 433-34 (1968).

reciprocal compensation payments for ISP traffic. For MFS and those CLECs who "opted-in" to the MFS agreement, this conclusion means that those parties shall receive reciprocal compensation for ISP-bound calls until July 1, 1999 under the rates set forth in the interconnection agreement.[20]

In conclusion, we find that with regard to the MFS agreement, telephone calls originating from a BA-MD provided telephone service end user to the respective ISP end users of MFS are subject to the reciprocal compensation provisions of that agreement. Based on the discussion above, we find that BA-MD was clearly in a position to know that the specific exclusion of such traffic from the definition of local traffic for purposes of the payment of reciprocal compensation was a necessity. BA-MD failed to incorporate such an exclusion and is, therefore, in breach of the MFS agreement under which it has withheld reciprocal compensation for ISP traffic.

Accordingly, we find that BA-MD must within 15 days of the effective date of this Order, pay all reciprocal compensation amounts withheld for ISP traffic under the MFS agreement. BA-MD also must continue to pay such amounts for the duration of the MFS agreement.

B. Arbitrated Agreements

The issue of whether parties who arbitrated the issue of reciprocal compensation for ISP-bound calls are still entitled to that compensation in light of the FCC's *ISP*

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[20] *See*, MFS agreement at §22.1. BA-MD's more recent interconnection agreements include explicit language excluding calls to the Internet from the payment of reciprocal compensation. See, e.g., Interconnection Agreement between BA-MD and Transwire Operations, LLC (Dec. 18, 1998) and Interconnection Agreement between BA-MD and Omnipoint Communications Enterprises, L.P. (Nov. 24, 1998). These parties, and any parties similarly situated would not be entitled to reciprocal compensation for ISP-bound calls. These parties are bound to their contractual agreement in the same manner and to the same extent as BA-MD.

Order is more problematic. Obviously, there is no question of BA-MD having agreed that ISP-bound calls were local in this situation. BA-MD vigorously argued in its negotiations with Sprint, for example, that ISP-bound calls were not "local traffic." Furthermore, as noted earlier, in the arbitration we concluded that ISP-bound calls were local. This conclusion appears to have been brought into question by the FCC's *ISP Order*.

However, even this conclusion does not totally resolve the issue. The FCC found that, even in cases where a State commission does not find that the parties voluntarily agreed on an inter-carrier compensation scheme, or where a state has not addressed the issue, "state commissions may nevertheless determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic."[21] State commissions may make such determinations "pursuant to contractual principles or other legal or equitable considerations, that reciprocal compensation is an appropriate *interim* inter-carrier compensation rule" pending completion of the FCC rulemaking on this issue.[22] Until such time as a federal inter-carrier compensation mechanism is developed, the FCC left the determination of the applicability of reciprocal compensation entirely to State commissions. Thus, under the FCC's *ISP Order*, it is incumbent upon this Commission to determine an interim cost recovery methodology which may be used until the FCC completes its rulemaking on this issue and adopts a federal rule governing inter-carrier compensation arrangements.[23]

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[21] *ISP Order*, at para. 25.

[22] *Id.*, at para. 27 (emphasis added).

[23] Specifically, the FCC stated that "[A]lthough reciprocal compensation is mandated under Section 251(b)(5) only for the transport and termination of local traffic, neither the statute nor our rules prohibit a state commission from concluding in an arbitration that reciprocal compensation is appropriate in certain circumstances not addressed by Section 251(b)(5), so long as there is no conflict with governing federal law." *ISP Order*, at para. 26.

In fact, according to the FCC, "State commissions are free to require reciprocal compensation for ISP-bound calls, or not require reciprocal compensation and **adopt another compensation mechanism**, bearing in mind that ISP/ESPs are exempt from paying access charges."[24] This directive does not leave us the option of providing for no compensation for ISP-bound calls. State commissions must either require reciprocal compensation or develop another compensation mechanism. To fail to provide for any compensation would violate the 1996 Act, which states:

> A State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier. 47 USC § 252(d)(2)(A).

We are very concerned that the adoption of BA-MD's position will result in CLECs receiving no compensation for terminating ISP-bound traffic. Such an effect will be detrimental to our efforts to encourage competition in Maryland. No one disputes that local exchange carriers incur costs to terminate the traffic of other carriers over their network. In the absence of finding that reciprocal compensation applies, a class of calls (ISP traffic) will exist for which there is no compensation. The reciprocal compensation rates established by our arbitration order and contained in the approved Statement of Generally Available Terms ("SGAT") reflect the costs of this termination. Until the FCC establishes an appropriate inter-carrier compensation mechanism for ISP-bound traffic, we find that it is in the public interest to require BA-MD to pay our arbitrated reciprocal compensation rates contained in

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[24] *ISP Order*, at para. 26 (emphasis added).

the SGAT as an **interim** compensation mechanism. Absent such a mechanism, CLECs will be forced to absorb these costs. However, we wish to stress that this compensation rate is a temporary, but necessary, measure. The parties are of course free to negotiate another compensation rate to be applied to ISP-bound traffic. In any event, our interim rate will only apply until the FCC issues an order creating its inter-carrier compensation mechanism for ISP-bound traffic.

IT IS, THEREFORE, this 11th day of June, in the year Nineteen Hundred and Ninety-Nine, by the Public Service Commission of Maryland,

ORDERED: (1) That the parties shall reconcile the amounts owed and Bell Atlantic-Maryland, Inc. shall remit payment of reciprocal compensation charges previously withheld within 15 days of this order.

(2) That Bell Atlantic-Maryland, Inc. shall continue to pay reciprocal compensation for ISP-bound traffic under its agreement with MFS and any CLECs who opted in to that agreement until the expiration of the MFS agreement.

(3) That, on an interim basis, the inter-carrier compensation mechanism for ISP-bound calls for providers not currently operating under an approved interconnection agreement, shall be the reciprocal compensation rates established in our arbitration Order as contained in the approved SGAT.

/s/ Glenn F. Ivey
/s/ Claude M. Ligon
/s/ Susanne Brogan
Commissioners

DISSENTING OPINION OF E. MASON HENDRICKSON AND GERALD L. THORPE, COMMISSIONERS

We respectfully dissent from the majority's decision in Order No. 75280 concerning Bell-Atlantic Maryland's ("Bell" or "BA-MD") petition for a Declaratory Order that Internet Traffic is not "Local" Traffic Subject to Reciprocal Compensation ("Petition"). It is our position that the February 26, 1999 Federal Communications Commission Order[1] is very clear in respect to the finding that calls from BA-MD's network to Internet Service Providers ("ISPs") served by interconnecting carriers are not local traffic subject to reciprocal compensation.

To recount some history, we concurred with both the Commission's September 7, 1997 Letter Order upholding MFS Intelenet of Maryland, Inc.'s ("MFS") complaint that Bell was refusing compensation for ISP calls, and the Letter Order of October 1, 1997 denying BA-MD's Petition for Reconsideration of the September 7 ruling. We did so on the ground that the FCC had earlier established the position that ISP calls are to be treated as if they were local in nature. Given this position, the legal right of MFS to recover reciprocal compensation through a mutually agreed-upon interconnection agreement seemed clear.

Not decided in these Letter Orders was the issue of what would happen if the FCC later deemed these calls not to be local in nature.[2] In the September 11, 1997 decision, for instance, the Commission noted that this "issue is currently being considered by the FCC and

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[1] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Declaratory Ruling, CC Docket 96-96 (rel. February 26, 1999).

[2] Also not decided in those Letter Orders was the issue of what would happen if calling volumes turned out to disproportionally favor one competitor over another and the impact such disproportionality could have on the competitive environment. We discuss that issue shortly.

may ultimately be resolved by it." The Commission then stated that "[i]n the event that the FCC issues a decision that requires revision to the directives announced herein, the Commission expects that the parties will so advise."

The language in Bell's interconnection agreement with MFS defines "Reciprocal Compensation" as involving "payment arrangements that recover costs incurred for the transport and termination of Local Traffic." Therefore, it is our view that the FCC's February 26, 1999 ruling removes any obligation of BA-MD to make payments under the reciprocal compensation provisions of the agreement for ISP-bound calls made after the date of the decision, because ISP-bound traffic no longer is defined as local in nature.

Further, we disagree with the majority's position that since Bell knew that ISP-bound traffic was included in the definition of local traffic at the time of the agreement, it is therefore stuck with the consequences until the expiration of the agreement even though the regulatory classification of ISP-bound traffic changed after the parties executed the agreement. Bell was reluctantly bound by the existing regulatory definition when it signed the agreement. Upon the FCC's change in the regulatory definition of ISP traffic, the operative definition in the Interconnection agreement between MFS and Bell now clearly excludes ISP bound traffic from the reciprocal compensation terms established for local traffic. This Commission has responsibilities to ensure the protection of the public good and the ability to revisit decisions due to public policy considerations should circumstances warrant it. The FCC's revised finding is, in our opinion, such an occasion.

In addition, as a result of examining the unbalanced ISP compensation flow between incumbent local exchange companies ("ILECs") and competing local exchange companies ("CLECs") nationally and in Mary-

land, it appears increasingly obvious that continuing the fiction of demanding compensation for ISP-bound calls as if they were local can be anti-competitive. Further, there are indications that some carriers are gaming the system to take advantage of the previous FCC policy, instead of competing on the basis of the ability to effectuate a sound business plan. Therefore, adhering to the policy that produced such unbalanced reciprocal compensation discourages, rather than encourages, actual competition for customers.

Accordingly, we do not share the majority's inclinations that the FCC's order leaves us limited options for alternative compensation arrangements for ISP-bound calls. Indeed, the FCC's order specifically states that parties to reciprocal compensation agreements continue to be bound by them, "as interpreted by [their] state commissions." That is, there is nothing in the FCC's order that would prevent a carrier from seeking reconsideration of a prior Commission order on this subject, or for that Commission to modify the earlier order.

Our preferences in this Order would have been as follows:

1. To grant, but modify, Bell's petition for a Declaratory Order by finding that calls from BA-MD's network to ISPs served by interconnecting carriers no longer constitute local traffic subject to reciprocal compensation after the date of the FCC's February 26, 1999 order;
2. For the parties to reconcile the amounts owed and for Bell to remit payment of reciprocal compensation charges for calls to ISPs made prior to February 26, 1999; and
3. To find that BA-MD shall not be liable to pay reciprocal compensation for ISP-bound calls made after February 26, 1999 under its

agreement with MFS and under its agreements with any other CLECs who opted into this provision of the MFS agreement.

/s/ E. Mason Hendrickson
Commissioner

/s/ Gerald L. Thorpe
Commissioner

APPENDIX D

Constitutional Provision

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Statutory Provisions

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

47 U.S.C. § 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty—

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the

agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty—

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether—

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering Administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusve jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than

subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with commission regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification—

(A) is necessary—

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) Definition of incumbent local exchange carrier

(1) Definition

For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that—

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if—

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

47 U.S.C. § 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negoti ated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation

and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory [illegible]tion

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning—

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall—

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and

reasonable rate for network elements for purposes of subsection (c)(3) of such section—

(A) shall be—

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless—

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed—

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject—

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that—

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority

Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality requirements.

(4) Schedule for decision

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by

negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of state commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

(f) Statements of generally available terms

(1) In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission—

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), and 253 of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

(h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) Definition of incumbent local exchange carrier

For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h) of this title.

47 U.S.C. § 261. Effect on other requirements

(a) Commission regulations

Nothing in this part shall be construed to prohibit the Commission from enforcing regulations prescribed prior to February 8, 1996, in fulfilling the requirements of this part, to the extent that such regulations are not inconsistent with the provisions of this part.

(b) Existing State regulations

Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to February 8, 1996, or from prescribing regulations after February 8, 1996, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.

(c) Additional State requirements

Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.

Regulatory Provisions

47 C.F.R. § 51.701. Scope of transport and termination pricing rules.

(a) The provisions of this subpart apply to reciprocal compensation for transport and termination of local telecommunications traffic between LECs and other telecommunications carriers.

(b) *Local telecommunications traffic.* For purposes of this subpart, local telecommunications traffic means:

(1) Telecommunications traffic between a LEC and a telecommunications carrier other than a CMRS provider that originates and terminates within a local service area established by the state commission; or

(2) Telecommunications traffic between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in § 24.202(a) of this chapter.

(c) *Transport.* For purposes of this subpart, transport is the transmission and any necessary tandem switching of local telecommunications traffic subject to section 251(b)(5) of the Act from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC.

(d) *Termination*. For purposes of this subpart, termination is the switching of local telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises.

(e) *Reciprocal compensation*. For purposes of this subpart, a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of local telecommunications traffic that originates on the network facilities of the other carrier.

47 C.F.R. § 51.703. Reciprocal compensation obligation of LECs.

(a) Each LEC shall establish reciprocal compensation arrangements for transport and termination of local telecommunications traffic with any requesting telecommunications carrier.

(b) A LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network.

Supreme Court, U.S.
FILED
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(2)

No. 00-1531

IN THE

Supreme Court of the United States

VERIZON MARYLAND INC.,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 47 U.S.C. §252(e)(6) grants a federal district court jurisdiction to review decisions of a state commission enforcing or interpreting previously approved interconnection agreements.

2. Whether a federal district court has subject matter jurisdiction under 28 U.S.C. §1331 to review state commission orders rendered pursuant to the Telecommunications Act of 1996 where suit under 47 U.S.C. §22(e)(6) is barred pursuant to the Eleventh Amendment to the United States Constitution.

3. Whether a state commission waives its sovereign immunity by participating in the administration of the Telecommunications Act of 1996.

4. Whether the Ex parte Young doctrine authorizes suit against the individual state commissioners for actions taken pursuant to the Telecommunications Act of 1996.

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No. 00-1531

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

The Maryland Public Service Commission and the individual Commissioners acting in their official capacity (collectively "the Maryland Commission") respectfully respond to the petition for writ of certiorari filed by Verizon Maryland, Inc. ("Verizon") seeking review of the judgment of the United States Court of Appeals for the Fourth Circuit.

The petition for certiorari seeks review of the Fourth Circuit's decision holding that the Maryland Commission did not waive its Eleventh Amendment immunity to federal district court review when it implemented the Telecommunications Act of 1996. 47 U.S.C. §251 et. seq. ("1996 Act") Verizon also seeks review of the Fourth Circuit's holding that the *Ex parte Young*[1] doctrine does not permit an action against the individual commissioners in their official capacity. Further, Verizon seeks review of the Court of Appeals' finding that a State commission's action interpreting or enforcing an interconnection agreement under the 1996 Act was not a "determination" under 47 U.S.C. §252 (e)(6). Finally, Verizon seeks review of the Fourth Circuit's holding that 28 U.S.C. §1331 does not provide a federal district court with independent subject matter jurisdiction to review determinations rendered by a State commission pursuant to the 1996 Act.

As noted by Verizon, three of the Fourth Circuit's holdings raise questions substantially identical to those on which this Court granted certiorari in *Mathias v. Worldcom Techs., Inc.*, No. 00-878 (March 5, 2001). The Fourth Circuit itself recognized that its holdings with regard to the constructive waiver of Eleventh Amendment immunity, the application of the *Ex parte Young* doctrine and the scope of §252(e)(6) of the 1996 Act conflict with decisions in other jurisdictions. (Pet. App. 20a, 30a and 44a-45a)[2] In light of the conflict among the circuit courts with regard to issues discussed above, the Maryland Commission does not oppose certiorari on these questions. However, the Maryland Commission's decision not to oppose certiorari should not be viewed as signaling agreement with the substantive arguments raised by Verizon before the Fourth Circuit. On

[1] *Ex parte Young*, 209 U.S. 123 (1908).

[2] "Pet. App." Refers to the Appendix to Verizon Maryland, Inc.'s Petition No. 00-1531.

the merits, the Maryland Commission disagrees with Verizon's presumed position and believes, as summarized below,[3] that the Fourth Circuit's decision on these issues is correct.

Verizon raises a fourth question which is not at issue in *Mathias*. The Fourth Circuit also held that 28 U.S.C. §1331 does not give a federal district court subject matter jurisdiction to review State commission actions taken pursuant to the 1996 Act. Verizon's §1331 argument does not merit further review. Verizon's claim of a conflict with the Sixth Circuit is spurious. Moreover, as discussed below, the Court of Appeals was correct in holding that federal district courts do not have independent subject matter jurisdiction under §1331 to review State commission decisions rendered pursuant to the 1996 Act.

STATEMENT OF THE CASE

This case involves federal court review of an order entered by the Maryland Commission. The Maryland Commission is an agency of the State of Maryland and it supervises and regulates telecommunications carriers in Maryland. As part of its responsibilities, the Maryland Commission administers and enforces the *Public Utility Companies Article* of the Maryland Code. Final orders or decisions of the Maryland Commission are subject to judicial review in Maryland circuit courts, *Public Utility Companies Article* §3-204 of the Annotated Code of Maryland. Parties

[3] Verizon's Petition presents no argument on the merits regarding these three issues. The Maryland Commission will postpone until its merits brief a full discussion of the Fourth Circuit's correct judgment on these issues. However, in light of the importance of these constitutional questions, certain points require discussion even at this early stage.

are entitled to further review by the Maryland Court of Special Appeals. *Id.* at §3-209.

This case began at the Maryland Commission when Verizon filed a request for declaratory ruling asking that the Maryland Commission find that Verizon was not obligated under §251 of the 1996 Act to pay reciprocal compensation for calls delivered to Internet Service Providers ("ISPs") who are served by competitive local exchange carriers ("CLECs"). The Maryland Commission issued a declaratory ruling finding that Verizon must continue to pay reciprocal compensation and Verizon sought review of this order pursuant to §252(e)(6) of the 1996 Act and 28 U.S.C. §1331.

A. THE TELECOMMUNICATIONS ACT OF 1996

Congress enacted the 1996 Act, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §251 et seq.) to open the local telecommunications markets to competition.[4] The 1996 Act[5] imposes a general duty on all telecommunications carriers to interconnect with other telecommunications carriers. 47 U.S.C. §251(a). With regard to incumbent local exchange carriers ("ILECs") such as Verizon, the duty to interconnect is even more specifically defined by §251(c)(2). In conjunction with these interconnection obligations, the

[4] At the time the 1996 Act was passed, 19 states had in place rules opening the local exchange market to competition. In seven states, competing firms already had begun to offer switched local service. These states were California, Illinois, Maryland, Massachusetts, Michigan, New York and Washington. Competition rules were in place in Arizona, Colorado, Connecticut, Florida, Georgia, Iowa, Louisiana, North Carolina, Ohio, Oregon, Tennessee and Virginia. See, *Common Carrier Competition Report*, CC Report No. 96-9, FCC, Common Carrier Bureau (Spring 1996) at page 3.

[5] *See*, 47 U.S.C. §§251-261. The 1996 Act is codified throughout Title 47 of the United States Code. References to the 1996 Act are to the relevant sections of the Code.

1996 Act requires all local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of telecommunications. 47 U.S.C. §251(b)(5). For purposes of compliance with this subsection, the 1996 Act provides that such terms and conditions must provide for the recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carriers. Further, such terms and conditions must determine costs on the basis of a reasonable approximation of the additional costs of terminating such calls. 47 U.S.C. §252(d)(2)(A). However, ILECs may negotiate and enter in a binding agreement with a requesting carrier without regard to the standards set forth in subsections (b) and (c) of §251.

The procedures for negotiations between Competitive Local Exchange Carriers ("CLECs") and ILECs are governed by §252 of the 1996 Act. If negotiating companies cannot reach agreement, §252 provides that the parties may request that the appropriate State commission arbitrate unresolved issues. Each interconnection agreement must be submitted to the State commission for approval, regardless of whether the agreement was negotiated by the parties or arbitrated by the State commission. 47 U.S.C. §252(e)(1). However, the State commission may only reject a negotiated agreement if it finds that the agreement discriminates against a telecommunications carrier, or the implementation of such an agreement is not consistent with the public interest. 47 U.S.C. §252(e)(2)(A).

B. PROCEEDINGS BEFORE THE MARYLAND COMMISSION

Pursuant to the 1996 Act, MFS Intelenet of Maryland, Inc. ("MFS") and Verizon entered into an interconnection agreement on July 16, 1996. The Maryland

Commission approved this agreement on October 9, 1996. On April 28, 1997, Verizon informed MFS that it would discontinue payment of reciprocal compensation for calls to ISPs, claiming that the Agreement's reciprocal compensation provisions did not apply to calls to ISPs. On May 21, 1997, MFS filed a complaint with the Maryland Commission alleging that the actions of Verizon violated the 1996 Act and the MFS Agreement. On September 11, 1997, the Maryland Commission found that Verizon must pay reciprocal compensation to MFS for calls to ISPs under the terms of the Agreement. The Maryland Commission's decision was upheld by the Circuit Court for Montgomery County, Maryland.[6]

The Maryland Commission considered this issue a second time within the context of a Sprint Communications Company, L.P. ("Sprint") complaint. Sprint filed a Motion for Resolution of Disputed Issue, seeking a Commission ruling on how ISP-bound calls should be treated. The Maryland Commission concluded that ISP-bound calls "are classified as local in nature and are therefore, subject to reciprocal compensation" from Verizon.

On February 26, 1999, the Federal Communications Commission ("FCC") released an Order addressing the jurisdictional status of calls to ISPs.[7] The FCC concluded that "ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate." However, the FCC further concluded that given the absence of a "federal rule regarding the appropriate inter-carrier compensation mechanism for this traffic, that parties should be bound by their existing interconnection agreements, as interpreted by State

[6] Civil Action No. 178260, Docket Entry #26, March 26, 1998.

[7] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Declaratory Ruling, CC Docket 96-96, 14 F.C.C.R. 3689 (February 26, 1999). ("*ISP Order*")

commissions."[8] In response to the FCC Order, Verizon asked the Maryland Commission to reconsider the previous decisions requiring reciprocal compensation for calls to ISPs.

On June 11, 1999, the Maryland Commission, resolved the issue raised by Verizon. The Order has two distinct parts. First, with regard to the MFS Agreement, the Commission found that, under contract principles and using the analysis sanctioned by the FCC, parties to the MFS Agreement are entitled to reciprocal compensation for ISP-bound calls until July 1, 1999. (Pet. App. 103a-104a) Second, the Maryland Commission determined that parties who do not have approved interconnection agreements should receive the arbitrated reciprocal compensation rates contained in the effective Statement of Generally Available Terms ("SGAT") as an interim compensation mechanism until the FCC establishes an appropriate inter-carrier compensation mechanism for ISP-bound traffic. (Pet. App. 106a-107a).

C. DISTRICT COURT DECISION

Verizon sought review of the Maryland Commission's Order in the United States District Court for the District of Maryland. First, Verizon objected to the Maryland Commission's determination that Verizon should continue to pay reciprocal compensation for ISP-bound calls pursuant to the terms of previously approved interconnection agreements. Verizon also objected to the Maryland Commission's determination that CLECs who do not have approved interconnection agreements shall receive the arbitrated reciprocal compensation rates contained in the effective SGAT as an interim compensation mechanism.

[8] *Id.*, at para. 1. See, also, para. 22.

On October 20, 1999, the District Court dismissed Verizon's Complaint, holding that: (1) the Commission and the individual commissioners were immune from suit under the Eleventh Amendment;[9] (Pet. App. 77a-84a) (2) the Commission was an indispensable party under Federal Rule of Civil Procedure 19(b) so that the case could not proceed without the Commission; (Pet. App. 84a- 86a) (3) alternatively, Verizon's challenge to that portion of the Commission's Order relating to the SGAT was not ripe for review. (Pet. App. 86a-90a) and (4) the Eleventh Amendment would bar suit brought pursuant to 28 USC §1331. (Pet. App. 90a)

D. THE FOURTH CIRCUIT DECISION

Verizon and the United States Government appealed the District Court's decision. On February 14, 2001, the United States Court of Appeals for the Fourth Circuit affirmed the District Court's decision. The Fourth Circuit reached four major conclusions. First, and foremost, the Court of Appeals found that a federal proceeding brought pursuant to §252(e)(6) of the 1996 Act against the Maryland Commission is constitutionally barred. The Fourth Circuit expressly found that Congress did not clearly manifest an intent to condition a state commission's participation in the regulation of interconnection agreements on a waiver of sovereign immunity from private suit. (Pet. App. 19a)

Second, and equally important, the Fourth Circuit also found that an action brought in federal court against the individual commissioners was constitutionally barred. Among other reasons, the Court of Appeals found that a

[9] Based on this holding, the District Court declined to address the Commission's agreement that the Court lacked jurisdiction to review Commission decisions **enforcing** interconnection agreements (Pet. App. 76a n.3)

federal court action against the State commissioners would improperly expand the federal remedy selected by Congress. (Pet. App. 29a)

The third determination by the Fourth Circuit was that §252(e)(6) does not confer jurisdiction on the federal courts to review a State commission's enforcement determinations. The Fourth Circuit found that because federal courts are courts of limited jurisdiction, determinations by State commissions that are not expressly designated for review in federal court are left for review by State courts. (Pet. App. 35a) The Court of Appeals then held that State commission orders administering and enforcing interconnection agreements are not §252 determinations (Pet. App. 47a) Thus, according to the Court, these orders are reviewable only by State courts. (*Id.)*

Finally, with regard to federal question jurisdiction, the Fourth Circuit held that 28 U.S.C. §1331 does not provide federal jurisdiction because Congress intended federal jurisdiction to be limited to the grant in 47 U.S.C. §252(e)(6). The Court of Appeals found that it "would be nonsensical to conclude that even though Congress carefully articulated jurisdictional responsibility in the 1996 Act, it nonetheless intended to have 28 U.S.C. §1331 override this effort." (Pet. App. 48a). According to the Fourth Circuit, "[t]he simple fact that interconnection agreements are "creations of federal law" does not make their interpretation a sufficiently substantial federal question to confer jurisdiction under 28 U.S.C. §1331." (Pet. App. 49a) (citations omitted)

ARGUMENT

A. THE FOURTH CIRCUIT'S HOLDING REGARDING 28 U.S.C. §1331 JURISDICTION DOES NOT MERIT FURTHER REVIEW.

Verizon alleges that the federal district court has jurisdiction under 28 U.S.C. §1331 to consider its allegations that the Maryland Commission's order violates the 1996 Act. Verizon is simply wrong in arguing that there is a certworthy conflict of authority between the Fourth Circuit's holding on the §1331 issue and the decision of the Sixth Circuit in *GTE North, Inc. v. Strand,* 209 F.3d 909, *cert. denied* 121 S.Ct. 380 (2000). The *Strand* decision is clearly distinguishable from the Fourth Circuit's ruling. Since no conflict exists among the circuits, certiorari on this issue should be denied.

In *Strand,* GTE challenged an order of the Michigan Public Service Commission issued pursuant to Michigan law. The Sixth Circuit found that although §252(e)(6) precludes federal review of interlocutory orders entered in the course of 1996 Act proceedings, the statutory provision does not preclude review of an order which was entered in an independent state law proceeding unrelated to an arbitration. *Id.* at 915.

In contrast, the Maryland Commission's order specifically involved the application of an FCC order interpreting the provisions of the 1996 Act. Verizon requested that the Maryland Commission find that pursuant to the FCC's *ISP Order* it was no longer obligated to pay reciprocal compensation for Internet traffic. The Maryland Commission expressly utilized the analysis sanctioned by the FCC in reaching its conclusion. (Pet. App. 98a-99a; 101a-103a).

Thus, the *Strand* decision is clearly distinguishable from the Fourth Circuit decision at issue in Verizon's Petition. The *Strand* Court held that §1331 jurisdiction was available to consider whether a State commission's order solely involving state law violated the 1996 Act. This state law question was not an issue in the Fourth Circuit appeal. Because there is no conflict between the two circuits, this Court should deny Verizon's Petition on this issue.

More importantly, the Fourth Circuit's determination on this issue is correct. Verizon misreads the Fourth Circuit's opinion and is simply mistaken in the manner in which it describes and criticizes the Fourth Circuit's decision. According to the Fourth Circuit, the exercise of §1331 general federal jurisdiction would undermine Congressional intent. (Pet. App. 48a) (citations omitted). The Fourth Circuit found that Congress created a limited federal right of review of State commission determinations and that Congress otherwise intended for the right of review to be exercised in State courts (Pet. App. 49a). The Fourth Circuit concluded that in light of the limited grant of jurisdiction in 47 U.S.C. §252(e)(6), the exercise of §1331 jurisdiction would undermine congressional intent. (Pet. App. 48a) (citations omitted)

Verizon's description of the Fourth Circuit's decision on this issue is misleading at best. Verizon's argument misses the point of the Fourth Circuit's discussion. The Court of Appeals found that in construing the reach of §1331, a court must look "carefully at the Congressional intent with respect to the federal statute in question to determine whether disputes under *that statute* were intended to be resolved in federal courts or State courts." (Pet. App. 49a) The Fourth Circuit cited *Jackson Transit Auth. v. Local Div.* 1285, *Amalgamated Transit Union*, 457 U.S. 15 (1982) for this proposition. Thus, the Fourth Circuit's determination

with regard to §1331 rested on *Congressional intent*. Verizon's discussion of state law versus federal law is simply irrelevant. A conclusion that such general jurisdiction exists would be contrary to the *Seminole* decision[10], which stands for the proposition that Congress' particular choice of remedies must be respected. Respect for Congressional intent means that generalized statutes cannot be used in place of the tailored ones Congress created.

Furthermore, Congress has not abrogated the Commission's sovereign immunity pursuant to §1331. The Supreme Court has expressly held that §1331 does not suffice to abrogate immunity for all federal questions. *Blatchford v. Noatak*, 501 U.S. 775, 786 (1991). In light of this proposition, no reasonable argument could be made that §1331 constitutes an abrogation of state immunity. Similarly, *Ex parte Young* is inapplicable for the reasons discussed below.

Finally, Verizon's complaint does not meet the requirements for jurisdiction under 28 U.S.C. §1331. Verizon's argument incorrectly assumes that the only test for §1331 jurisdiction is whether the action "arises under" federal law. In reality, the "arising under" test is just the first step in the analysis. The district courts have that jurisdiction which Congress grants through statute. Even though Congress has conferred general federal question jurisdiction on the district courts under 28 U.S.C. §1331 in terms similar to the constitutional provision, the term "arising under" in the statute is narrower than the similarly defined constitutional power. *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 495 (1983). Because federal question jurisdiction ultimately depends on an act of Congress, the scope of the

[10] *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996).

district courts' jurisdiction depends on the Congressional intent manifested in the statute at issue.

Section 1331 should be construed strictly and all doubts should be resolved in favor of State court jurisdiction. *Aetna Inc. Co. v. Chicago RI & PR Co.*, 229 F.2d 584, 586 (10th Cir. 1956). In the "vast majority" of cases where federal-question jurisdiction exists, federal law creates the plaintiff's cause of action. See, *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 808 (1986).

Courts begin with the presumption that if a statute does not expressly create a private cause of action, one does not exist. *See, Louisiana Landmarks Soc. Inc. v. City of New Orleans,* 85, F.3d 1119, 1123 (5th Cir 1996). By now, Congress is well aware of this presumption and how to provide private remedies. *See, Touche Ross & Co. v. Redington,* 442 U.S. 560, 572 (1979).

Under the settled framework for evaluating whether a private cause of action may be inferred from a statute, the questions to be resolved are whether the plaintiff is part of the class for whose special benefit the statute was passed; and whether the indicia of legislative intent reveals a Congressional purpose to provide a private cause of action. *Cort v. Ash*, 422 U.S. 66, 78 (1975).

Unless Congressional intent to create a private cause of action can be inferred from the language of the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist. *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 94 (1981). Whether Congress has created an enforceable right is determined by its intent. *Smith v. Kirk*, 821 F.2d 980, 982 (4th Cir. 1987). Neither the language of

the 1996 Act nor its legislative history indicates that Congress intended to create a private cause of action.

The legislative history of the 1996 Act establishes that Verizon is not a part of the class for whose special benefit the statute was enacted. The Act itself expresses Congress' intent "to promote competition and reduce regulation in order to secure lower prices and higher quality services for ***American telecommunications consumers*** and encourage the rapid deployment of new telecommunications technologies." Telecommunications Act of 1996, Pub. L. No. 104-104, purpose statement, 110 Stat. 56, 56 (1996). (emphasis added) In its report concerning the legislation, Congress specifically stated that:

> . . . in order to secure lower prices and higher quality services for **American telecommunications consumers** . . . The result will be lower prices to **consumers and businesses,** . . . a competitive edge for **American businesses,** . . . Indeed, the enormous **benefits to American businesses and consumers** from lifting the shackles of monopoly regulation . . .

H.R. Rep. No. 204, 104th Cong., 2nd Sess. 4748, *reprinted in* U.S. CCAN (March 1996) (emphasis added). Thus, it is clear that the 1996 Act was enacted to benefit consumers, not ILECs such as Verizon.

With regard to the second factor, an examination of the legislative history and statutory scheme presents no indication that Congress intended to create a private cause of action. The only express grant of federal jurisdiction in the 1996 Act is limited to suits brought by parties to interconnection agreements. 47 U.S.C. §252(e)(6). That

Congress expressly provided for a private cause of action in §252(e)(6) is evidence that when Congress wished to provide a private remedy, it knew how to do so and did so expressly. *Touche*, 442 U.S. at 572.

Consideration of the first two *Cort* factors is dispositive. The language of the statute and its legislative history do not suggest that the Act was intended to create federal rights for the benefit of a class of persons but rather was intended to benefit the public at large through a regulatory scheme to be administered in large part by the States. *See, California v. Sierra Club*, 451 U.S. 287, 298 (1981). Nor is there any evidence that Congress anticipated that there would be a private remedy. This being the case, it is unnecessary to inquire further to determine whether the purpose of the statute would be advanced by the judicial implication of a private action or whether such a remedy is within the federal domain of interest. These factors are only of relevance if the first two factors give indication of Congressional intent to create the remedy. *Id., citing, Touche,* 442 U.S. at 574-576.

The conclusion that the 1996 Act does not create a private cause of action negates Verizon's claim of federal subject matter jurisdiction. In the absence of a federal statutory cause of action, declaratory relief is available only when a federal statute totally precludes State regulation of the matter being litigated. In other words, the federal statute must have entirely occupied the field, preventing any state regulation of matters within the scope of the federal statute. *Western Air Lines, Inc. v. Port Authority of New York and New Jersey*, 817 F.2d 222, 225-26 (2nd Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). See, also *Burgio and Campofelice, Inc. v. NYS Dept. of Labor*, 107 F.3d 1000, 1007 (2d Cir. 1997). A preemption cause of action for declaratory relief is not an alternative means for enforcing

the substantive provisions of the federal statute. *Western Air Lines v. Port Authority of New York & New Jersey*, 817 F.2d at 225-26.

The District Court of California reached the same conclusion concerning a challenge to §254 of the 1996 Act. In this case, the California Public Utilities Commission ("PUC") adopted two end-user surcharges to finance intrastate universal telephone service programs. The Utility Reform Network ("TURN") challenged this decision as being preempted by the Telecommunications Act of 1996. The California District Court found that an individual may challenge State regulations despite the lack of statutory cause of action only when a federal statute forbids State regulation of the area that the State is purporting to regulate. In other words, only when the federal statute had "occupied the field" thereby preventing any State regulation of matters falling within the scope of the federal statute. *Turn v. CPUC*, 26 F.Supp. 2d 208 (N.D. Cal. 1998) The California Court specifically noted that it was "not aware of any authority holding that a preemption cause of action may serve as a vehicle to challenge an otherwise permissible State regulation simply because it allegedly violates a substantive provision of a federal statute." *Id.* The Court concluded that the plaintiff could not challenge the CPUC's compliance with the substantive provisions of the 1996 Act by means of a preemption cause of action.

No reasonable argument could be made contending that the 1996 Act entirely preempts state regulation of local exchange service or local exchange carriers. Among a variety of other things, §252 requires a State commission to determine wholesale rates in the context of an arbitration. *See, e.g.*, §§251(c)(4) and (6); 251(d)(3); 251(f), 252, 253(b) and (f), 254 and 261(c).

This Court should find that the 1996 Act does not create a private cause of action, nor does it "occupy the field," thereby preventing any state regulation of matters falling within the scope of the federal statute. Given these conclusions, the Court should hold that the district court did not have jurisdiction pursuant to 28 U.S.C. §1331.

B. THE FOURTH CIRCUIT CORRECTLY HELD THAT THE ELEVENTH AMENDMENT MANDATES THAT THIS CASE BE DISMISSED.

The Fourth Circuit correctly found that the Maryland Commission did not constructively waive its sovereign immunity. In *College Savings,* the Supreme Court repudiated the doctrine of constructive waiver under the Commerce Clause. The Court rejected the idea of implied waiver of state sovereign immunity as incompatible with its cases requiring an express waiver of immunity by the State itself. *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 680 (1999). *College Savings* confirmed that a State's waiver must be a deliberate, express waiver made by the State itself and that such waiver cannot be implied. *Id.* at 680-83.

As this Court has previously held, a state does not consent to suit in federal court simply by engaging in federally regulated conduct even where Congress has provided that the state will be subject to private suit if it engages in that conduct. *Id.* Under the 1996 Act, the State commissions are merely agreeing to obey federal laws in participating in a federal program. Agreeing to obey federal law does not constitute an agreement to be sued in federal court. See, *Innes v. Kansas State University*, 184 F.3d 1275, 1283 (10th Cir. 1999).

Any argument based on constructive waiver presupposes that Congress has the authority pursuant to Article I §8, Cl.3 of the United States Constitution to force a State to waive its Eleventh Amendment immunity as a condition of participating in a field subject to federal regulation. However, the *Seminole* Court stated in no uncertain terms, that "the Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed on federal jurisdiction." *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 72-73 (1996). Thus, as noted by the *College Savings* Court, the *Seminole* decision "expressly repudiates" the proposition that Congress has authority, under the Commerce Clause, to expand Federal jurisdiction. *College Savings,* 527 U.S. at 683. Therefore, allowing federal courts to apply the doctrine of constructive waiver based on Congress' commerce powers would directly contravene the Supreme Court's express repudiation of this doctrine in *Seminole.*

Because Congress has no authority under its Article I Commerce Clause powers to abrogate state sovereign immunity, *Seminole* 517 U.S. at 71-72, it follows that Congress may ***not*** make the waiver of sovereign immunity a condition to the state's action in a field that Congress has authority to regulate under the Commerce Clause. In the present case, where Congress is not empowered to abrogate the Eleventh Amendment immunity conferred upon the Commission directly, likewise it cannot do so indirectly through principles of constructive waiver. The Maryland Commission has not waived its immunity by participating in the regulation of telecommunications. The telecommunications industry indisputably involves a quintessential state interest - the provision of telecommunications services to the citizenry at competitive

rates - protection of which Congress cannot condition on a state's waiver of vital state rights.

Furthermore, the conclusion that Congress could have excluded states from any role in the 1996 Act is irrelevant to determining whether a state has constructively waived its immunity. Under this analysis, Congress would be permitted to do indirectly what it cannot do directly, namely, abrogate a state's immunity pursuant to the Commerce Clause by making abrogation a "condition" of participation. Since the Supreme Court has previously ruled that Congress cannot abrogate states' immunity through the Commerce Clause, it would be illogical to permit Congress to condition any "gift" on accepting abrogation of Eleventh Amendment immunity pursuant to this very same constitutional provision.

The linchpin of any constructive waiver argument is the contention that the 1996 Act constitutes a "gift". Verizon argued below that §252(c)(5) rendered the State's participation in the 1996 Act voluntary because the FCC would take over the responsibilities of any state who "chooses" not to participate. However, this interpretation of §252(c)(5) is overly broad and contrary to the plain meaning of that provision. Section 252(e)(5) states:

> "if a State commission fails to act to carry out its responsibility under this section **in any proceeding or other matter** . . . the [FCC] shall issue an order preempting the State commission's jurisdiction **of that proceeding or matter** . . . and shall assume the responsibility of the state commission . . . **with respect to the proceeding or matter** . . . . " (emphasis added)

Clearly, this provision envisions the FCC assuming jurisdiction over discrete proceedings or matters, not taking over wholesale responsibility for telecommunications regulation in a state. This conclusion is supported by the Joint Committee of Conference Report which described the Senate provision as requiring that the FCC "shall assume the responsibilities of the State in the **applicable proceeding or matter**." H.R. Conf. Rep. No. 104-458 (1996), reprinted in 1996 U.S.C.C.A.N. 124 (emphasis added) Congress could not have contemplated the FCC taking full responsibility for regulatory local service in the states. The reason the states are included in the 1996 Act is not "in the spirit of federalism" but because the federal government is incapable of regulating such a vast industry on its own. Essentially, Congress is using the States to implement a program that the federal government would be incapable of carrying out on its own.

Maryland's experience with opening the local market to competition demonstrates that the 1996 Act was not a "benefit" but an unwarranted intrusion. Maryland's only "gains" under the 1996 Act were a loss of autonomy. Prior to the 1996 Act, Maryland had sole authority over its local exchange market and had begun opening this market in 1994.[11] After the Congressional enactment, Maryland is now forced to share that authority with the FCC and can even be preempted by that agency. Certainly no reasonable person would interpret this outcome as a "benefit" or "gift" to Maryland. In actuality, all the benefits flowed to the FCC, which is permitted to usurp the State's traditional regulatory authority.

[11] *Re MFS Intelenet of Maryland, Inc.* 85 Md. PSC 38 (April 25, 1994). *Re MFS Intelenet of Maryland, Inc.*, Phase II, 86 Md. PSC 467, 470-71 (Dec. 28, 1995).

Furthermore, participation by the states in the 1996 Act's regulatory scheme was not voluntary. Regulation of local exchange carriers traditionally has been within the police powers of the State. The telecommunications industry indisputably involves a quintessential "state interest" - the provision of telecommunications services to the citizenry at competitive rates-protection of which Congress cannot condition on a state's waiver of vital rights. Upon passage of the 1996 Act, a state was forced to either abide by the federal regulations or cede its power to regulate to the FCC (a classic Hobson's choice). The option of either consenting to federal regulation and waiving immunity or losing the previously held power to regulate a local exchange carrier is not a choice that any court should perceive as voluntary.

The 1996 Act passed the "point of coercion" because the effect of Maryland's refusal to waive its immunity is the exclusion of the State from an otherwise lawful activity. *See, College Savings,* 527 U.S. at 687. Under the 1996 Act, a State has the choice of seeing its commission frozen out of effective enforcement of state-related service and interconnection issues, as well as federal matters under §§251 and 252, **or** the State is stripped of its immunity from federal judicial review. The states are thus denied that "dignity and respect" to which a sovereign state is entitled.

There is no arguable basis to conclude that the State's continued regulation of local telephone carriers is a "benefit" from Congress, which justifies constructive waiver of Eleventh Amendment immunity. This Court should hold that abrogation of Eleventh Amendment immunity as the price of "opting into" the scheme created in §252 is an invalid option in light of *Seminole* and *College Savings.* Therefore, the Maryland Commission's Eleventh Amendment immunity was not waived through its

participation in §252 arbitration proceedings. The 1996 Act's requirement of federal review is unconstitutional.

C. THE FOURTH CIRCUIT'S HOLDING THAT THIS PROCEEDING DOES NOT MEET THE REQUIREMENTS OF THE *EX PARTE YOUNG* EXCEPTION ALSO IS CORRECT.

Argument that jurisdiction exists pursuant to the *Ex parte Young*[12] ignores the changes to this doctrine engendered by the *Seminole* decision. Application of the *Seminole* doctrine leads to the conclusion that finding jurisdiction under *Ex parte Young* in this instance would be inappropriate. In *Seminole*, this Court found that when a statute implies that Congress intended an alternative, specific form of relief, be available to enforce compliance with that statute, a court should infer that Congress did not intend the federal court to provide traditional *Ex parte Young* injunctive relief.

The remedial scheme of the 1996 Act includes a federal court remedy to allow for a review of an interconnection agreement to determine whether the agreement complies with §§251 and 252. But this federal court remedy does not contemplate injunctive relief. In addition, the 1996 Act imposes no set of judicial sanctions against a State commission for failure to timely adhere to the expedited timetable. Clearly, the federal court relief available under §252(e)(6) is far less onerous than the relief that would be available pursuant to an *Ex parte Young* suit. Section 252(e)(6) only allows for a review of an interconnection agreement whereas an *Ex parte Young* action against a State commission would expose the Commissioners to the full remedial powers of a federal court, including

[12] *Ex parte Young*, 209 U.S. 123 (1908).

presumably, contempt sanctions. Thus, to allow an *Ex parte Young* action against the Commissioners would be to "rewrite the statutory scheme", render superfluous the limited statutory remedy provided under §252(e)(6) and would permit the plaintiff to obtain relief against the individual Commissioners that they could not otherwise obtain pursuant to §252(e)(6).

Any attempt to achieve jurisdiction through the *Ex parte Young* fiction rather than through a §252(e)(6) action will frustrate Congress' clear intent that the 1996 Act provides the ***exclusive*** remedies against the State commissions. Like the statute in *Seminole*, §252(e)(6) does not "stand alone" but was created in the context of a carefully crafted statutory scheme. Just as the *Seminole* Court refused to replace Congress' unconstitutional attempt to abrogate states' immunity with a judicially created remedy, so to should this Court refuse to apply *Ex parte Young* to the 1996 Act. It is illogical to infer that Congress intended to subject State Commissioners to broad federal injunctive relief and contempt powers. Congress would have expressly provided for such a significant remedy had it intended to do so.

Another factor militating against use of *Ex parte Young* relief is the fact that Congress clearly intended for §252(e)(6) actions to proceed against State commissions, not individual commissioners. In *Seminole*, the Court looked to the federal statute at issue and determined that it was not Congress' intent to create a cause of action against the state officials, relying on a literal reading of the statute to support this analysis. According to the Court, where a statutory scheme unmistakably authorizes a state or its agency to act, as opposed to an individual state official, *Ex parte Young* does not provide a vehicle whereby relief may be obtained. *Seminole*, 517 U.S. at 75 n.17. The *Seminole* Court

determined that absent explicit Congressional authorization, courts should not permit the use of an *Ex parte Young* action to negate a State's sovereign immunity. Thus, in order to determine whether Verizon's action against the Commissioners may proceed, this Court is required to determine whether Congress intended to limit the availability of *Ex parte Young* suits over a cause of action brought under the 1996 Act.

In the 1996 Act, **all** of the provisions in §§251 and 252 refer to the "State Commission" or "the State" and **none** of the provisions refer to individual State commissioners. Section 252(e)(6), the statutory provision relied upon by the plaintiffs to initiate this case, is entitled "Review of State Commission Actions". That heading alone implies that an appeal will be filed against the State Commission. Section 252 refers forty-five times to the "state commission" with four such references contained in the subsection headings. See, 47 U.S.C. §§252(b)(4)(e), (e)(6), and (f)(2). Section 252 never refers to individual state commissioners. This overwhelmingly demonstrates that Congress designed the §252(e)(6) action to proceed against the **State commission**.[13]

The Congressional remedy crafted into the 1996 Act does not authorize a suit against a state official as required by *Seminole*, 517 U.S. at 75. Congress' remedial scheme does not include state commissioners as parties to actions brought under §252(e)(6). "When Congress crafts particular remedies for particular wrongs, the presumption is that these are the exclusive remedies and that such limitations as they

[13] In fact, the actions Verizon complained of could not be accomplished by any of the five Maryland Commissioners acting alone. The Maryland Commission only can act by majority vote on such a matter. It is the action of the Maryland Commission as an entity that is required under the 1996 Act as a prerequisite to judicial review by this Court, not the actions of the individual Commissioners.

may embody are not to be circumvented . . . " *McDonnell v. Cisneros*, 84 F.3d 256, 261 (7th Cir. 1996). The fact that Congress created on unconstitutional remedy, which allowed for suit against the State, should not change this result.

D. THE FOURTH CIRCUIT CORRECTLY FOUND THAT FEDERAL DISTRICT COURTS LACK SUBJECT MATTER JURISDICTION OVER THE ENFORCEMENT DECISIONS OF STATE COMMISSIONS.

In the proceedings below, the Maryland Commission argued that the district court lacked subject matter jurisdiction over enforcement decisions rendered by State commissions. The Fourth Circuit agreed with this contention. This conclusion is supported by the plain language of the 1996 Act.

First, and foremost, the explicit language of §252(e)(6) compels the conclusion that federal district courts lack subject matter jurisdiction over enforcement decisions. Section 252(e)(6) only purports to grant jurisdiction "to determine whether on agreement or statement meets the requirements" of the 1996 Act. Under the plain language of this section, federal jurisdiction only extends to the review of a decision approving or rejecting an interconnection agreement. This conclusion is buttressed by §252(e)(4) which only preclude state court jurisdiction "to review the action of a State commission in approving or rejecting an agreement . . ." (emphasis added) This section is silent as to the enforcement of the terms and conditions of an interconnection agreement. Therefore, there is no basis to conclude any complete preemption of state review in the last sentence of §252(e)(4). In addition, the Conference Report fails to mention, let alone discuss, the judicial review procedures to suggest any specific Congressional purpose.

H.R. Conf. Ref. No. 104-458, at 124-126 (1996). Read properly, §§252(e)(4) and 252(e)(6) only grant jurisdiction to review the terms of an agreement, jurisdiction over enforcement of these terms is not granted.

Thus, the 1996 Act does not expressly preclude review of enforcement decisions by State courts. The permissive language of §252(e)(6), coupled with the specific exclusion contained in §252(e)(4), leads inescapably to the conclusion that Congress did not intend to totally divest State courts of jurisdiction. If Congress had wanted to preclude State court review of enforcement decisions under the 1996 Act, it would have used explicit language as it did in §252(e)(4). See, e.g., *Charles Dowd Box Co. v Courtney*, 386 U.S. 502, 507-508(1962).

Furthermore, Section 601(c)(1),[14] in conjunction with 252(e)(4), strongly suggests that **no implied** federal court authority regarding enforcement actions can be read into 252(e)(6). The Commission contends that a finding of federal jurisdiction through implication violates the Article III limitations on federal district courts.

Furthermore, Congress did not unequivocally express its intent to abrogate the Commission's Eleventh Amendment immunity with regard to enforcement decisions. See, *Seminole*, 517 U.S. at 55. Congressional intend to abrogate the States' immunity from suit must be obvious from a "clear legislative statement." *Seminole*, 517 U.S. at 55. No clear legislative statement regarding judicial review of the **enforcement decisions** of state commissions is contained within §252(e)(6) of the 1996 Act. This action for enforcement of an agreement is one step further removed

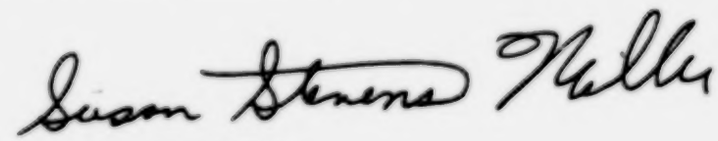
[14] §601(c)(1) provides that "this act and the amendments made to this act shall not be construed to modify, impair, or supercede Federal, State or local law unless expressly so provided in such Acts or amendments."

from Congressional intent to provide for federal court review to determine whether the agreement or statement meets the requirements of §252(e)(6). This Court has made clear that a "general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." *Atascadero v. Scanlan*, 473 U.S. 234 (1985).

CONCLUSION

The Maryland Commission does not oppose certiorari insofar as Verizon seeks review of the Fourth Circuit's holdings concerning constructive waiver, the application of the *Ex parte Young* doctrine and the extension of §252(e)(6) jurisdiction to enforcement decisions of State commissions. In all other respects, the petition for certiorari should be denied.

Respectfully submitted,



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REPLY BRIEF FOR PETITIONER

The Maryland Public Service Commission ("PSC") and its individual members state in their brief in opposition that they "do[] not oppose certiorari" on the questions relating to the scope of § 252(e)(6), waiver of Eleventh Amendment immunity, and application of *Ex parte Young*. Br. in Opp. 2. They insist, however, that the § 1331 issue does not warrant further review, arguing (1) that there is no "certworthy conflict" (*id.* at 10) between the decision below and the Sixth Circuit's decision in *GTE North, Inc. v. Strand*, 209 F.3d 909, *cert. denied*, 121 S. Ct. 380 (2000), and (2) that the Fourth Circuit's determination of the issue was correct.

The PSC is wrong on both counts.

1. According to the PSC, the Sixth Circuit's holding in *Strand* — that § 1331 provides subject matter jurisdiction to review a state commission order for alleged violation of federal law — applies only to orders "entered in an independent state law proceeding unrelated to an arbitration" under the 1996 Act. Br. in Opp. 10. *Strand* is therefore "clearly distinguishable from the Fourth Circuit's ruling" in this case, the PSC argues, because the administrative order at issue here was adopted under *federal* law, not state law. *Id.*[1]

There are at least three things wrong with the PSC's analysis. First, contrary to the PSC's view, the Sixth Circuit nowhere restricted its jurisdictional holding to state commission orders issued under state law. As the court itself stated, its holding rested on a broader jurisdictional principle — namely, that "federal review is available under § 1331 to determine whether state commission orders violate federal law except in cases in which the challenged regulatory action is clearly an interlocutory order arising out of § 252 proceedings." 209 F.3d at 919. Indeed, the Sixth Circuit specifically rejected the notion — embraced not only by the district court in *Strand*, but also by the Fourth Circuit and the PSC here — that "§ 252(e)(6) is the exclusive basis for judicial review of state commission actions that in any way relate to interconnection agreements." *Id.* As the Sixth Circuit explained, that restrictive theory would allow state commissions to "insulate regulatory requirements that violate the [1996 Act] from federal, and possibly even state, court review," and would thereby "conflict[] with Congress's decision . . . to concentrate judicial review of interconnection agreements in the federal courts." *Id.*

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[1] As the PSC explains, its "order specifically involved the application of an FCC order interpreting the provisions of the 1996 Act." Br. in Opp. 10.

Second, the PSC's theory would impute to Congress an intention to adopt a most improbable jurisdictional scheme — one that opens the federal courts to review of state commission orders issued in the exercise of *state* law authority, while closing the federal courts to review of state commission orders issued in the exercise of *federal* law authority. That is not what the Sixth Circuit held, nor is it a sensible reading of the statutory text or congressional purpose.

Third, the Fourth Circuit's decision rests on the proposition that the PSC's order was adopted, in part, in the exercise of state law authority. *See* Pet. App. 42a. The PSC cannot explain why the state commission's determination in *Strand* — which, like the PSC's determination here, involved interpretations of federal law — was somehow more of an "independent state law proceeding" than the PSC proceeding at issue here, much less how this would support its claim that the order in *Strand* was subject to review in federal court, while the PSC's order here was not. Indeed, the PSC's insistence that *Strand* is distinguishable on this basis is particularly unconvincing because the Fourth Circuit itself acknowledged that its ruling was inconsistent with *Strand*. *See id.* at 50a.

2. The PSC fundamentally misconceives the merits of the § 1331 issue, conflating subject matter jurisdiction with unrelated notions of abrogation of Eleventh Amendment immunity, federal preemption, and private rights of action (*see* Br. in Opp. 11-17), while failing meaningfully to confront the key precedents summarized in the Petition.

At the core of the PSC's confusion is its misapprehension of *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986). At issue in that case were state court tort actions alleging that a child was born with multiple deformities as a result of the mother's ingestion of Bendectin during pregnancy. The question

was whether the actions were properly removed to federal court on the theory that a count in the complaints alleged that Bendectin was "misbranded" in violation of the Federal Food, Drug, and Cosmetic Act ("FDCA"). For purposes of resolving that issue, the parties accepted, and the Court assumed, that Congress "determin[ed] to preclude federal private remedies" for violation of the FDCA. *Id.* at 814. On the basis of that assumption, the Court held "simply . . . that the congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction." *Id.*

Mistakenly believing that this case is akin to *Merrell Dow*, the PSC launches into a lengthy discussion of whether the 1996 Act creates a private cause of action to challenge a state commission's violation of federal law and whether the 1996 Act occupies the field of telecommunications regulation and therefore precludes all state regulation. *See* Br. in Opp. 13-17. Unlike the situation in *Merrell Dow*, however, the action in this case was not brought in state court to vindicate rights established under state law. Rather, the action was brought in federal court to vindicate federal rights and to secure review of administrative action implementing a federal statute. Contrary to the PSC's assumption, the 1996 Act nowhere forecloses an action challenging the decision of a state commission, issued in the exercise of federal law authority, for alleged violations of the federal statute. *See* Pet. 21 ("Nothing in the text or legislative history of the 1996 Act supports the proposition that, insofar as § 252(e)(6) does not apply, Congress 'intended for the right of review to be exercised in State courts.'") (quoting Pet. App. 49a). As this Court has held, "the silence of Congress as to judicial

review is . . . not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts." *Stark v. Wickard*, 321 U.S. 288, 309 (1944).

Here, as in *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15 (1982), the question is not whether Congress intended to create an implied federal right of action to "vindicate contractual rights set forth by federal statutes," but rather "whether Congress intended such contract actions to set forth federal, rather than state, claims." *Id.* at 21, 22. Because "Congress intended that . . . [interconnection] agreements be 'creations of federal law,' and that the rights and duties contained in those contracts be federal in nature," the action here "states federal claims" and therefore properly invokes the federal district court's jurisdiction under § 1331. *Id.* at 23 (citation omitted). *See also International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 692 (1963).

The PSC's assessment of the standards "for evaluating whether a private cause of action may be inferred from a statute" (Br. in Opp. 13) is therefore beside the point. So too is its discussion of whether the 1996 Act "totally precludes State regulation" of interconnection agreements. *Id.* at 15. It obviously does not. But that has nothing to do with whether an action challenging the manner in which a state commission conducts such regulation raises fundamentally federal issues within the subject matter jurisdiction of a district court under § 1331. It obviously does.

At bottom, the PSC's defense of the Fourth Circuit's decision ignores the fact that the Fourth Circuit never questioned that Verizon sought to vindicate rights under federal, not state, law. Pet. App. 7a. This Court recently and unequivocally held that, in such circumstances, the federal courts have jurisdiction under

§ 1331 regardless of whether the cause of action is one created by state law or federal law. *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997).

The decision in *City of Chicago* is particularly instructive here. A property owner alleging (among other things) federal constitutional violations filed state court actions challenging, under a state administrative-review statute, a decision of the Chicago landmarks commission denying an application for permits to demolish designated landmarks. The city defendants removed the case to federal district court, and this Court ruled that removal was proper in these circumstances because the "state court complaints raised a number of issues of federal law in the form of various federal constitutional challenges." *Id.* at 164. It was of no consequence that "the federal constitutional claims were raised by way of a cause of action created by state law." *Id.* "As we have explained, . . . '[e]ven though state law creates [a party's] causes of action, its case might still "arise under" the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law.'" *Id.* (quoting *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13 (1983)) (brackets in original).

The circumstances in this case are significantly more compelling than those in *City of Chicago*. Unlike the municipal landmarks commission there, which exercised state law authority to resolve issues under a municipal ordinance, the PSC here was exercising federal law authority to resolve issues under a federal statute. If the state suits there arose under federal law for purposes of § 1331, surely the federal suit here, which raises issues fundamental to proper implementation of the 1996 Act, likewise arises under federal

law and falls clearly within the federal district court's jurisdiction under § 1331.

Significantly, the PSC does not respond at all to our reliance on this Court's federal tariff cases (*Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 534 (1983) (per curiam); *Louisville & N.R.R. v. Rice*, 247 U.S. 201, 202 (1918)) or on *Stark v. Wickard* and its progeny, even though both lines of authority also strongly support federal court jurisdiction in this case. *See* Pet. 21-24. The PSC's silence on these cases is testimony to the force of their analogy to the circumstances at issue here.

3. We believe, for the reasons stated in the Petition and in this Reply, that a federal district court has independent subject matter jurisdiction under § 1331 to determine whether a state commission's action interpreting or enforcing an interconnection agreement violates the 1996 Act. It is important to note, however, that the correctness of our position is less important at this stage than the undisputed fact that consideration of the § 1331 issue is necessary to ensure that the Court can resolve the full set of jurisdictional questions related to the § 252(e)(6) issue that this Court has already agreed to review in *Mathias*.

If the Court holds in *Mathias* that § 252(e)(6) does not provide subject matter jurisdiction, there is some doubt whether it could consider § 1331 as an alternative basis of jurisdiction there because the § 1331 issue is not presented in that case.[2] But, as we explained in the Petition (at 4, 14), and as the Solicitor General has confirmed in the government's separate Petition (which likewise presents the § 1331 issue),

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[2] The Court specifically limited its grant of certiorari in that case to three restated questions, none of which involves § 1331. Moreover, the court of appeals in *Mathias* gave no consideration to § 1331 in reaching its decision.

"the telecommunications industry and federal and state regulators have a need for prompt and definitive resolution of the question whether federal courts may review state commission decisions enforcing interconnection agreements." No. 00-1711 Pet. 13-14. The PSC has not disputed the urgent need for a conclusive determination of the closely related jurisdictional and constitutional issues raised here. That would be reason enough to grant certiorari in this case even if there were no circuit split on § 1331.

Certiorari is particularly appropriate here, moreover, because, as the Solicitor General explains, "some question may exist as to the standing" of the petitioners in *Mathias*. No. 00-1711 Pet. 14. Because the Illinois Commerce Commission ("ICC") and its commissioners (the petitioners in *Mathias*) prevailed on the merits in the Seventh Circuit, "[a] decision by this Court in the ICC's favor on the Eleventh Amendment and jurisdictional issues would afford the ICC no greater relief with respect to that case." *Id.*[3] The Solicitor General accordingly suggests that, "if the Court has any substantial concern about the ICC's standing in *Mathias*, the Court may wish to grant plenary review in this case as well." *Id.*

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[3] As the Solicitor General notes (at 14 n.3), the collateral-order doctrine permits a state agency to appeal immediately an interlocutory order denying its claim of Eleventh Amendment immunity. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). The underlying rationale for that principle is that the immunity would otherwise be "'effectively lost if a case is erroneously permitted to go to trial.'" *Id.* at 144 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). That rationale does not appear to bear on the question of standing in a case like *Mathias*, however, where the case has already proceeded to the merits and has been decided in the state agency's favor.

CONCLUSION

The petition for a writ of certiorari should be granted, at least as to questions 2, 3, and 4, and the case should be set for oral argument in tandem with *Mathias v. WorldCom Techs., Inc.*, No. 00-878. Alternatively, the petition should, at a minimum, be held pending the decision in *Mathias* and then disposed of as appropriate in light of that decision.

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QUESTION PRESENTED

Whether a federal district court has independent subject matter jurisdiction under 28 U.S.C. § 1331 to determine whether a state public utility commission's action interpreting or enforcing an interconnection agreement violates the Telecommunications Act of 1996.

LIST OF PARTIES TO THE PROCEEDING BELOW

The parties in the court of appeals were as follows:

American Communications Services of Marypland, Inc.

Bell Atlantic-Maryland, Inc. (now Verizon Maryland Inc.)

Susanne Brogan, in her official capacity as Commissioner of the Public Service Commission of Maryland

E. Mason Hendrickson, in his official capacity as Commissioner of the Public Service Commission of Maryland

Glenn F. Ivey, in his official capacity as Chairman of the Public Service Commission of Maryland

Claude M. Ligon, in his official capacity as Commissioner of the Public Service Commission of Maryland

MCI WorldCom, Inc.

MCImetro Access Transmission Services, Inc.

Maryland Office of People's Counsel

Public Service Commission of Maryland

RCN Telecom Services of Maryland, Inc.

Catherine I. Riley, in her official capacity as Commissioner of the Public Service Commission of Maryland

Starpower Communications, LLC

TCG-Maryland

United States of America

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Verizon Maryland Inc. states the following:

Verizon Maryland Inc. (formerly Bell Atlantic-Maryland, Inc.) is a wholly owned subsidiary of Verizon Communications Inc., a publicly held company. No publicly held company owns 10% or more of the stock of Verizon Communications Inc.

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IN THE

Supreme Court of the United States

No. 00-1531

VERIZON MARYLAND INC.,
Petitioner,
v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.,
Respondents.

No. 00-1711

UNITED STATES OF AMERICA,
Petitioner,
v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONER VERIZON MARYLAND INC.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-72a)[1] is reported at 240 F.3d 279. The opinion of the district court (Pet. App. 73a-90a) is not reported. The order of the Maryland Public Service Commission (Pet. App. 91a-111a) is not reported.

[1] "Pet. App." refers to the appendix to the petition filed by Verizon Maryland Inc. in No. 00-1531.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 2001. The petition for a writ of certiorari in No. 00-1531 was filed on April 5, 2001, and the petition for a writ of certiorari in No. 00-1711 was filed on May 15, 2001. On June 25, 2001, both petitions were granted, limited to Question 2 presented by each petition. 121 S. Ct. 2548. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution, the relevant provisions of the Telecommunications Act of 1996 and the Federal Communications Commission's implementing regulations, and 28 U.S.C. § 1331 are set forth at Pet. App. 112a-134a.

STATEMENT OF THE CASE

As required by the Telecommunications Act of 1996 ("1996 Act"), petitioner Verizon Maryland Inc. ("Verizon") entered into an "interconnection agreement" with respondent MFS Intelenet of Maryland, Inc. ("MFS"), a competitive local exchange carrier ("CLEC"). The interconnection agreement provided that "reciprocal compensation" — the amount that one interconnecting carrier pays another for traffic that originates on one network and terminates on the other — would be due only to the extent required by the 1996 Act. The Federal Communications Commission ("FCC") ruled that the 1996 Act does not require reciprocal compensation for Internet-bound traffic. The Maryland Public Service Commission ("PSC") nevertheless interpreted the interconnection agreement to require Verizon to pay MFS reciprocal compensation for Internet-bound traffic, a ruling that forced Verizon to transfer to MFS and other competitors many millions of dollars that it had never agreed to pay and that federal law did not require it to pay. Verizon challenged the PSC's decision in federal district court, basing jurisdiction, in part, on 28 U.S.C. § 1331.

The question presented by this case is whether a federal court may exercise § 1331 "arising under" jurisdiction in an action alleging that a state commission has interpreted or enforced a 1996 Act interconnection agreement in violation of federal law.

1. Interconnection Agreements and the 1996 Act. The 1996 Act "fundamentally restructures local telephone markets" by subjecting incumbent local telephone companies to "a host of duties intended to facilitate market entry." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). The documents detailing incumbents' duties, though referred to as "interconnection agreements," are not voluntary contracts in any ordinary sense. An incumbent local exchange carrier ("LEC") has no choice about whether to enter into such an "agreement" when a CLEC makes a request. On the contrary, the 1996 Act requires incumbents, upon a CLEC's request, "to negotiate in good faith . . . the particular terms and conditions of agreements to fulfill" the 1996 Act's substantive duties. 47 U.S.C. § 251(c)(1); *see also id.* § 252(a)(1).

Although carriers are permitted to "negotiate and enter into a binding agreement . . . without regard to the standards set forth" in the 1996 Act (*id.* § 252(a)(1)), "many so-called 'negotiated' provisions represent nothing more than an attempt to comply with the requirements of the 1996 Act" (*AT&T Communications of Southern States, Inc. v. BellSouth Telecomms., Inc.*, 229 F.3d 457, 465 (4th Cir. 2000)). That is so because the Act, as interpreted by the FCC, effectively discourages attempts to negotiate terms that provide either less or more than the Act requires.

First, parties negotiate against the backdrop of statutory and regulatory requirements that dictate the

minimum terms to which an incumbent carrier will be held in the absence of a negotiated agreement. Section 252(b) provides that either party to a negotiation may "petition the state commission . . . to arbitrate open issues, which arbitration is subject to § 251 and the FCC regulations promulgated thereunder." *AT&T*, 525 U.S. at 373; *see* 47 U.S.C. § 252(b), (c). Accordingly, so long as an issue has already been "resolved by . . . FCC Rules and interpretations," a CLEC has little motivation to accept anything less than the federal requirement. *AT&T Communications*, 229 F.3d at 465.

Second, an incumbent is discouraged from agreeing to anything that exceeds its obligations under federal law because "any interconnection, service, or network element provided under an agreement approved under" § 252 must be made available to "any other requesting telecommunications carrier upon the same terms and conditions." 47 U.S.C. § 252(i). As a consequence, an incumbent cannot safely engage in ordinary "give-and-take" because, as the FCC has interpreted § 252(i), "every concession . . . made (in exchange for some other benefit) by an incumbent LEC will automatically become available to every potential entrant." *AT&T*, 525 U.S. at 395. Together, therefore, §§ 252(b) and 252(i) impel the parties to match the terms of their interconnection agreement to the commands of federal law.

Whether an agreement is arrived at by negotiation or arbitration, the parties must submit the agreement to the appropriate state public utility commission for approval and public filing. *See* 47 U.S.C. § 252(a)(1), (e)(1). Once an agreement has been approved, federal law requires the parties to abide by its terms. Section 252(a)(1) explicitly provides that interconnection agreements are "binding." *Id.* § 252(a)(1). Likewise, several provisions in § 251 refer to the obligation of incumbent carriers to provide network access and interconnection "in accordance with the terms and

conditions of the agreement." *See id.* § 251(c)(2)(D), (c)(3). In short, the obligations imposed by an interconnection agreement are not private contractual obligations, but federal regulatory obligations that apply equally to all similarly situated telecommunications carriers.

2. Reciprocal Compensation and the Internet. Section 251(b)(5) requires LECs to enter into "reciprocal compensation arrangements for the transport and termination of telecommunications." *Id.* § 251(b)(5). Under "reciprocal compensation," when a customer of Carrier A places a call to a customer of Carrier B in the same local calling area, Carrier A pays Carrier B for terminating that local call. Likewise, when a customer of Carrier B calls a customer of Carrier A, Carrier B pays Carrier A for terminating the call.

The FCC has consistently held that § 251(b)(5)'s reciprocal-compensation obligation applies only to intra-exchange telecommunications traffic (that is, calls that originate and terminate within the same local calling area). For non-local or "interexchange" calls, a different set of rules applies (those governing long-distance "access charges").[2]

The application of this rule to traditional local voice telephone calls has been relatively straightforward, but the question whether reciprocal compensation applies to Internet-bound calls has given rise to disputes. A customer typically initiates an Internet session by

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[2] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16013, ¶ 1034 (1996) (subsequent history omitted); *see also* Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98 & 99-68, FCC 01-131, 2001 WL 431687, ¶¶ 36-37 (rel. Apr. 27, 2001) ("*ISP Remand Order*") (confirming that § 251(b)(5) does not apply to "access services or services associated with access"), *petitions for review pending*, Nos. 01-1218 *et al.* (D.C. Cir.).

using a modem to connect to the facilities of an Internet service provider, or "ISP," such as America Online. The ISP then completes the communication link by connecting the customer to the requested website, which may be located anywhere in the world.

CLECs have typically argued that, because many ISP access numbers are "local" — that is, associated with the subscriber's local calling area — Internet-bound calls are subject to reciprocal compensation under § 251(b)(5). Incumbents, by contrast, have typically maintained that Internet-bound calls are interstate and interexchange in nature, because such calls do not terminate at the ISP's modem but continue in an unbroken transmission to distant websites. Before the FCC definitively resolved this issue, a number of state commissions had ruled that Internet-bound calls are actually two calls — a local call to the ISP and a subsequent communication between the ISP and the distant website — and that the initial call to the ISP is local in nature and therefore subject to reciprocal compensation.

The FCC has made clear that those rulings were incorrect. It has repeatedly ruled that an Internet-bound call is a single end-to-end communication between the customer and the distant website, a call that is therefore interstate and interexchange. *See ISP Remand Order* ¶¶ 58-60. The agency has specifically ruled that, because Internet-bound traffic is interstate access traffic, it is "not subject to the reciprocal compensation requirement in section 251(b)[(5)]." *Id.* ¶ 23; *accord id.* ¶ 30.

The FCC also explained in detail that the decisions of various state commissions requiring payment of reciprocal compensation for Internet-bound traffic have directly undermined the goals of the 1996 Act. Such rulings have "led to classic regulatory arbitrage," were

a "windfall" for CLECs, and "distort[ed] the development of competitive markets." *Id.* ¶¶ 21, 29, 70. Such payments give CLECs "every incentive to compete, not on [the] basis of quality and efficiency, but on the basis of their ability to shift costs to other carriers." *Id.* ¶ 4. The FCC expressed its approval of state commission decisions denying CLECs compensation for Internet-bound calls (*id.* ¶¶ 80, 82); it also preempted contrary decisions on a going-forward basis and imposed a federal compensation mechanism, intended gradually to eliminate such payments. At the same time, the *ISP Remand Order* did not purport to affect prior state commission decisions that had ordered reciprocal compensation, leaving that matter to the ordinary process of judicial review.

3. **The Dispute Below.** In May 1997 — well before the FCC had addressed the issue of reciprocal compensation for Internet-bound traffic — MFS filed a complaint with the Maryland PSC alleging that Verizon's refusal to pay reciprocal compensation on Internet-bound traffic violated the 1996 Act and the parties' interconnection agreement. The PSC ruled that Internet-bound calls are local and therefore subject to reciprocal compensation. Pet. App. 94a-96a. The PSC promised to revisit its determination, however, in the event that subsequent FCC rulings had a bearing on the subject. *Id.* at 106a-107a.

In February 1999, the FCC expressly ruled that Internet-bound calls are non-local calls that do not qualify for reciprocal compensation under § 251(b)(5). *See* Declaratory Ruling, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 FCC Rcd 3689 (1999).[3] Immediately

[3] This ruling was vacated by the D.C. Circuit in *Bell Atlantic Telephone Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). The *ISP Remand Order* reaffirmed the FCC's prior conclusion.

thereafter, Verizon asked the PSC to revise its own prior determination in light of the FCC's controlling interpretation of federal law. The operative language of the governing interconnection agreement left no doubt that the parties' obligations tracked those imposed under federal law. The agreement provides:

> "Reciprocal Compensation" is As Described in the [1996] Act, and refers to the payment arrangements that recover costs incurred for the transport and termination of Local Traffic . . . .

See C.A. App. 55; Pet. App. 101a. The agreement also defines "Local Traffic" in a manner that tracks the then-existing FCC regulation almost word for word. *See* C.A. App. 53; Pet. App. 101a.[4]

Nonetheless, a sharply divided PSC refused, by a 3-2 vote, to alter its earlier determination. Instead, it ruled that, because "the treatment of [Internet-bound] traffic as local was so prevalent in the industry," Verizon "had an obligation to negate such local treatment in the interconnection agreements it entered into by specifically excluding [Internet-bound] traffic from the definition of local traffic subject to the payment of reciprocal compensation." Pet. App. 103a. The majority also expressed concern that the FCC's holding (that Internet-bound traffic is not subject to reciprocal compensation) "will result in CLECs receiving no compensation for terminating [Internet]-bound traffic"; it therefore adopted an interim compensation mechanism for Internet-bound traffic in direct conflict with the federal rule. *Id.* at 106a-107a.[5]

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[4] After the PSC approved the Verizon-MFS agreement, a number of other CLECs adopted the relevant provisions of the agreement pursuant to § 252(i) and the FCC's implementing regulations.

[5] The district court held that this aspect of the PSC's decision was not ripe for review. Pet. App. 89a. Neither party appealed that holding.

4. The Proceedings Below. Verizon sought review of the PSC's decision in the United States District Court for the District of Maryland, citing as the basis for jurisdiction 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331. The complaint named as defendants the Maryland PSC, the members of the Maryland PSC in their official capacity, MFS, and the five other affected carriers.

On the PSC's motion, the district court dismissed the complaint on the ground that the Eleventh Amendment precluded its exercise of subject matter jurisdiction under either § 252(e)(6) or § 1331. Pet. App. 73a-90a.

A divided panel of the Fourth Circuit affirmed. *Id.* at 1a-72a. The majority began by rejecting Verizon's Eleventh Amendment arguments, holding both that the PSC did not waive its immunity from suit in federal court by voluntarily participating in the 1996 Act's regulatory scheme (*id.* at 14a-21a), and that the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), does not permit this action to proceed against the individual members of the PSC in their official capacity to restrain ongoing violations of federal law (Pet. App. 21a-30a). Having ruled that neither the PSC nor its members could lawfully be made parties to the federal court action, the court held next that the district court lacked jurisdiction under § 252(e)(6) to allow the action to proceed against the private defendants. *Id.* at 30a-47a.

Finally, on the specific question presented here, the majority held that "28 U.S.C. § 1331 does not provide federal jurisdiction over [Verizon's] claims" because, in its judgment, "Congress intended that federal jurisdiction be limited to the grant in 47 U.S.C. § 252(e)(6)." *Id.* at 50a. The court predicated its holding, in part, on

its view that the *Rooker-Feldman* doctrine[6] — under which "lower federal courts are not authorized to review final judgments from State court proceedings" (*id.* at 50a n.8) — should be extended to prohibit, "in the absence of specific federal authorization," federal court review of orders issued by "a State quasi-judicial body, such as the Maryland Public Service Commission." *Id.* at 50a. The court acknowledged that its ruling on § 1331 conflicted with the Sixth Circuit's decision in *GTE North, Inc. v. Strand*, 209 F.3d 909, 919 (6th Cir.), *cert. denied*, 531 U.S. 957 (2000). *See* Pet. App. 50a.

Judge King dissented. Concerned that the majority had "isolate[d] itself . . . from every other court of appeals that has decided these issues" (*id.* at 52a), and "find[ing] these [other] decisions highly persuasive in addressing the jurisdictional and immunity issues" (*id.* at 53a-54a), Judge King concluded (i) that "§ 252(e)(6) expressly confers jurisdiction on the federal courts to review the states' enforcement determinations" (*id.* at 56a); (ii) that "a state waives the defense of sovereign immunity by electing to participate in the regulation of interconnection agreements" (*id.* at 59a); and (iii) that, "[e]ven if Maryland had not waived its Eleventh Amendment immunity, the individual members of the Commission still may be sued in their individual capacities, pursuant to *Ex parte Young*, for prospective injunctive relief" (*id.* at 67a). Because Judge King believed that "jurisdiction is provided in the district courts by § 252(e)(6)," he found it "unnecessary . . . to reach the argument that 28 U.S.C. § 1331 confers general federal question jurisdiction." *Id.* at 58a n.5. He added, however, that, "contrary to the assertion of

[6] The *Rooker-Feldman* doctrine refers to *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

the majority, the *Rooker-Feldman* doctrine has no application here." *Id.* (citation omitted).

5. The Grant of Certiorari. Both Verizon and the United States filed petitions for writs of certiorari raising all four issues (jurisdiction under § 252(e)(6), jurisdiction under § 1331, Eleventh Amendment waiver, and *Ex parte Young*). This Court granted both petitions, limiting its grant to Question 2 presented by each petition — whether, if 47 U.S.C. § 252(e)(6) does not apply, a federal district court has independent subject matter jurisdiction under 28 U.S.C. § 1331 to determine whether a state public utility commission's action interpreting or enforcing an interconnection agreement violates the 1996 Act. The Court consolidated the cases and set them for oral argument in tandem with No. 00-878, *Mathias v. WorldCom Technologies, Inc.*, which presents the remaining three questions raised by the petitions for writs of certiorari in this case.

SUMMARY OF ARGUMENT

Section 1331 grants federal district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." A civil action "arises under" federal law for purposes of § 1331 when "a right or immunity created by the Constitution or laws of the United States [is] an element, and an essential one, of the plaintiff's cause of action." *Gully v. First Nat'l Bank*, 299 U.S. 109, 112 (1936); *accord City of Chicago v. International College of Surgeons*, 522 U.S. 156, 163-64 (1997). Verizon's claim below — that the PSC's determination violated the federal Telecommunications Act of 1996 — plainly satisfies that test. Moreover, neither the 1996 Act nor this Court's *Rooker-Feldman* doctrine divests a federal district court of jurisdiction over a case like this one.

I. An action seeking review of a state commission's interpretation of a 1996 Act interconnection agreement arises under federal law.

A. In the 1996 Act, Congress granted incumbent carriers the statutory right to "negotiate and enter into *a binding agreement* with the requesting telecommunications carrier or carriers," and to do so "without regard to the standards set forth in [§ 251(b) and (c)]." 47 U.S.C. § 252(a)(1) (emphasis added). Federal law thus gives Verizon the right to insist that it be held only to the terms of the interconnection agreement to which it actually agreed. The statutory right granted under § 252(a) is accordingly "an element, and an essential one," of Verizon's claim.

B. Any claim relating to the rights and obligations imposed under a 1996 Act interconnection agreement raises questions of federal law. Contrary to the court of appeals' apparent understanding, interconnection agreements are not ordinary state-law contracts, but rather "federal contract[s]," the interpretation or enforcement of which, under this Court's precedents, raises questions of federal law subject to federal court jurisdiction under § 1331. *International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 692 (1963). Like the Railway Labor Act contracts at issue in *Central Airlines*, interconnection agreements "are creations of federal law and bound to the statute and its policy"; they are "therefore governed and enforceable by federal law, in the federal courts." *Id.*

That conclusion is fortified by a separate line of this Court's decisions. Because federal law mandates the creation of interconnection agreements, stipulates that they include a detailed schedule of charges, directs that they be published, requires a carrier to provide service according to their terms, and specifies that service must be made available on the same terms to all parties, these 1996 Act agreements are functionally

indistinguishable from federal tariffs. Insofar as interconnection agreements possess the core characteristics of tariffs, this Court's precedents strongly suggest that a claim involving enforcement of such an agreement, like a claim involving enforcement of a federal tariff, necessarily arises under federal law and presents questions reviewable in federal court. *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 534 (1983) (per curiam); *Louisville & N.R.R. v. Rice*, 247 U.S. 201, 202 (1918).

II. No other law barred the district court from exercising the jurisdiction granted to it under § 1331.

A. Nothing in the 1996 Act suggests that Congress intended to restrict the jurisdiction of the federal courts in cases like this one. The 1996 Act specifically confers jurisdiction on federal courts under § 252(e)(6) and withdraws jurisdiction from state courts under § 252(e)(4). To the extent those sections do not reach this case, the statute is silent on the proper method for review. This Court has held that "the silence of Congress as to judicial review is . . . not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction." *Stark v. Wickard*, 321 U.S. 288, 309 (1944). This is true even if the statute in question specifically provides for judicial review in other circumstances. *Id.*; *see also Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 56 (1993); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 494 (1991).

B. The *Rooker-Feldman* doctrine does not divest the federal court of its federal-question jurisdiction in a case like this one. That doctrine "interprets 28 U.S.C. § 1257 as ordinarily barring direct review in the lower federal courts of a decision reached by the highest state court, for such authority is vested solely in this Court." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 622 (1989). The doctrine has no application to judicial review of

determinations by a state administrative agency. As this Court held in *City of Chicago*, "federal jurisdiction generally encompasses judicial review of state administrative decisions." 522 U.S. at 169.

That holding applies with full force here. First, the PSC was exercising authority granted to it under *federal* law, not merely under state law. Just as federal courts have jurisdiction to review action by federal agencies, they likewise have jurisdiction to review action by state agencies exercising federal statutory authority. Second, unlike the situation in *City of Chicago*, *all* of Verizon's claims arise under federal law. Thus, there is no issue here concerning litigation of state-law issues in federal court. For the same reason, the concerns that animate abstention doctrine have no application to this case.

ARGUMENT

At issue in this case is whether a federal district court has jurisdiction under 28 U.S.C. § 1331 to determine whether a state public utility commission has interpreted a 1996 Act interconnection agreement in a manner consistent with federal law. This Court has already suggested the answer to that question, having observed that "there is no doubt . . . that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *AT&T*, 525 U.S. at 378 n.6.

That principle applies here: it is a core function of the federal courts to ensure that federal administrative authority is exercised in accordance with governing federal law. "From the beginning 'our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.'" *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986) (quoting

Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967)) (alteration in original). Such review is fundamental to the constitutional legitimacy of the delegation of power by Congress. "The responsibility of determining the limits of statutory grants of authority . . . is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction." *Stark*, 321 U.S. at 310. "[U]nder Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power." *Id.*

It is of no consequence that the PSC is a state rather than a federal agency. *See City of Chicago*, 522 U.S. at 169. In resolving the dispute between the private parties before it concerning the scope of Verizon's duties under the interconnection agreements at issue, the PSC was exercising federal authority under a federal statute that sets forth Congress's scheme for regulation of local telecommunications markets. For that reason, if the PSC had declined to exercise that authority, as it was free to do, the FCC would have had to step in and "assume the responsibility of the State commission . . . with respect to the proceeding or matter." 47 U.S.C. § 252(e)(5).[7] In the PSC's view,

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[7] The FCC did precisely that when the Virginia State Corporation Commission declined to act in a case involving issues similar to those that the PSC addressed in the decision at issue here. The FCC ruled that the Virginia commission's refusal to "interpret and enforce . . . interconnection agreements" constituted a "'fail[ure] to act to carry out its responsibility' *under section 252*," and it accordingly preempted the Virginia commission's jurisdiction and assumed its responsibility to decide the matter. Memorandum Opinion and Order, *Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 15 FCC Rcd 11277, 11280, ¶ 7 (2000) (quoting 47 U.S.C. § 252(e)(5)) (emphasis added).

Congress's scheme required the transfer of millions of dollars from Verizon to the private defendants below. Verizon's claim is that federal law does not authorize the exaction the PSC imposed. Under settled law, such a claim invokes the jurisdiction of the federal courts.

I. VERIZON'S CLAIM ARISES UNDER FEDERAL LAW

"For purposes of determining whether jurisdiction exists under § 1331(a) . . . , it is not necessary to decide whether [Verizon's] alleged cause of action . . . is in fact a cause of action 'on which [Verizon] could actually recover.'" *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 70 (1978) (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946)). Rather, the test is whether the claimed right is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666 (1974). When a plaintiff claims that "'federally protected rights have been invaded,'" the "allegations are sufficient to sustain jurisdiction under § 1331(a)." *Duke Power*, 438 U.S. at 71 (quoting *Bell*, 327 U.S. at 684).

Verizon's claim rests on at least two sources of federal rights that the PSC's determination directly invaded. The first is the statutory right to enter into a "binding agreement" without regard to requirements that would otherwise be imposed under federal law. 47 U.S.C. § 252(a)(1). The second is the interconnection agreements themselves; the rights and obligations that arise thereunder are intrinsically federal in nature. Either source of rights establishes an independent and sufficient basis for federal court jurisdiction.

A. A Federal District Court Has Jurisdiction To Determine Whether the PSC's Interpretation Violates Verizon's Federally Protected Right To Enter into "Binding Agreement[s]"

Verizon's fundamental claim is that, in requiring Verizon to pay reciprocal compensation on Internet-bound traffic, the PSC acted contrary to the terms of the governing interconnection agreement, when read in light of controlling federal law. If that claim is correct — and it must be accepted as correct for purposes of determining the district court's jurisdiction — the PSC's determination violated § 252(a)(1), which provides that incumbent LECs may "negotiate and enter into a binding agreement . . . without regard to the standards set forth in [§ 251(b) and (c)]." 47 U.S.C. § 252(a)(1). Because federal law dictates that interconnection agreements, duly negotiated, approved, and filed in accordance with the requirements of § 252, are binding, a state commission is not permitted to impose obligations inconsistent with their terms.

The statutory right at issue is central to the congressional scheme. The obligations imposed on incumbent LECs under the 1996 Act represent an unprecedented intrusion on their right to control their own property. *See Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 399-400 (7th Cir. 2000) (noting that the 1996 Act imposes "a host" of "affirmative duties to help one's competitors"). To reduce somewhat the intrusion that this regulation represents, Congress permits incumbents, in the first instance, to establish the terms of agreements free from direct regulatory interference. *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 793 n.9 (8th Cir. 1997) ("an incumbent LEC is not bound by the Act's substantive standards in conducting voluntary negotiations"), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). That

relative freedom from the direct imposition of regulatory duties in circumstances where the parties have agreed to terms implementing the statute would be lost if a state commission were free to impose obligations notwithstanding the contrary terms of an interconnection agreement. It is, in part, the commission's lack of power to impose such obligations that gives meaning to § 252(a)(1).

For example, a state commission might regard an agreement to limit reciprocal compensation payments to those calls that are subject to reciprocal compensation under the 1996 Act as unwise for policy reasons. It might be "concerned" that such an agreement would "result in CLECs receiving no compensation for terminating [Internet]-bound traffic." Pet. App. 106a. It might believe that CLECs "incur costs to terminate" such traffic and that, absent reciprocal compensation, "CLECs will be forced to absorb these costs." *Id.* at 106a-107a. And it might, for this reason, labor to find a way around the plain language of an interconnection agreement, thereby rendering the parties' agreement non-binding and denying the incumbent its rights under § 252(a).

A state commission need not *deliberately* misconstrue an interconnection agreement to deny a party its rights under § 252(a). Whenever a state commission misinterprets an interconnection agreement the injury to the rights of the aggrieved party is the same. In judging whether a state commission's interpretation of an agreement is wrong, the district court's scope of review is a familiar one. *See, e.g., Shields v. Utah Idaho Cent. R.R.*, 305 U.S. 177, 185 (1938) (the question is "whether the [agency] in arriving at its determination departed from the applicable rules of law"). If the state commission's determination cannot withstand such review, it is inconsistent with § 252(a).

The circumstances of this case demonstrate the importance of that principle. The parties' agreement here provides that "Reciprocal Compensation" is "As Described in the Act," a defined term that means "as described in or required by the [1996] Act and as from time to time interpreted in the duly authorized rules and regulations of the FCC or the [PSC]." Interconnection Agreement §§ 1.7, 1.61 (*see* C.A. App. 49, 55; Pet. App. 101a). The agreement further provides that reciprocal compensation is limited to "Local Traffic," defined as traffic that "is originated" and "terminates" within the same local calling area. *Id.* § 1.44 (*see* C.A. App. 53; Pet. App. 101a).

Verizon's claim is that the parties' agreement means what it says: reciprocal compensation is "as described in or required by the [1996] Act." And Verizon further claims that, as a matter of federal law, payment of compensation for Internet-bound traffic is *not* reciprocal compensation "as described in or required by the [1996] Act." The FCC has recently confirmed that understanding of federal law. *See ISP Remand Order* ¶ 23 (holding that the 1996 Act does not require payment of reciprocal compensation for Internet-bound traffic); *cf.* Interconnection Agreement § 1.7 (recognizing binding effect of "duly authorized rules and regulations of the FCC") (*see* C.A. App. 49).

The agreement's express incorporation of the federal statutory standard governing reciprocal compensation accentuates the federal interest in this case. As noted above, parties often adopt provisions that "fulfill the duties described in [§ 251(b) and (c)]" (47 U.S.C. § 251(c)(1)) by tracking the requirements imposed by those statutory provisions and the FCC's implementing regulations. *See AT&T Communications*, 229 F.3d at 465). A state commission's construction of such provisions is therefore tantamount to an interpretation of the 1996 Act and the FCC's regulations. Recognizing that such determinations involve matters of federal law

prevents state commissions from disturbing the balance of interests struck by Congress and promotes uniformity in the application of federal law. Indeed, the identical dispute over the requirements of federal law may arise either before or after an agreement is approved. In both circumstances, judicial review for consistency with federal law ensures that Congress's legislative choices will be respected.

B. Any Claim Based on a 1996 Act Interconnection Agreement Arises Under Federal Law

Even if § 252(a) did not grant Verizon an express statutory right to be held only to those obligations contained in its interconnection agreement, there is no question that Verizon's claims here depend on rights and obligations derived from the parties' interconnection agreement. In a regulatory scheme like the 1996 Act, where the governing document implements underlying federal statutory duties, the rights and duties imposed by those documents are questions of federal law. Two related lines of authority make that conclusion inescapable.

1. Disputes concerning 1996 Act interconnection agreements satisfy the "arising under" requirement of § 1331 because such documents are federal contracts that implement federal policy and embody federal standards. Unlike ordinary commercial contracts, which reflect voluntary undertakings by willing parties acting without legal compulsion, 1996 Act interconnection agreements are the product of federal legal coercion designed to implement federal obligations. Incumbent LECs such as Verizon are required by federal law to negotiate these agreements to discharge their obligations under the 1996 Act — specifically, "to fulfill the duties described in [§ 251(b) and (c)]." 47 U.S.C. § 251(c)(1). Federal law, moreover, requires incumbents to enter into good-faith negotiations at the behest of a requesting carrier even if they would

otherwise be unwilling to do so — indeed, even if state law would otherwise *prohibit* such inter-carrier negotiations and agreements. *See id.* § 261(c).

Further, federal law enumerates the specific duties that are subject to negotiation, establishes the minimum terms to which an incumbent must "agree" on request, and subjects the resulting agreements to governmental approval under specified federal standards, without which the agreement has no effect. *See id.* §§ 251(b)-(c), 252(e). Federal law further requires that these agreements be publicly filed, and it provides that the incumbent carrier must make the provisions of any approved interconnection agreement available to any other requesting carrier on the same terms and conditions. *See id.* § 252(h), (i). Finally, once such an agreement is approved, the incumbent has a federal-law duty to provide service "in accordance with the terms and conditions of the agreement." *Id.* § 251(c)(2)(D), (c)(3).

One cannot fairly describe such agreements as a genuine product of the parties' voluntary consent. On the contrary, they reflect the positive command of federal law. In closely analogous circumstances, this Court held that a dispute over the construction of a labor-management agreement entered into pursuant to § 204 of the Railway Labor Act raised a federal question for purposes of § 1331. *International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. at 695-96. The reasoning in that case compels the same conclusion here.

Under § 204, airlines and their employees were required to establish a board of adjustment to settle employee grievances. *Id.* at 686. A contract between an airline and a union established such a board, and the board ruled against the airline in a grievance proceeding. When the airline refused to comply, the union brought a federal action to enforce its award.

The court of appeals, affirming an order dismissing the case for lack of jurisdiction, held that the complaint "did not disclose 'affirmatively a federally-created cause of action' and that 'this suit is nothing more than a state-created action to construe a contract.'" *Id.* at 684.

This Court unanimously reversed. The Court noted that the duty to establish adjustment boards was imposed under § 204 and that "[t]he extent and nature of the legal consequences of this duty though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted." *Id.* at 690-91 (internal quotation marks omitted). For this reason, it was

> the statute and the federal law which must determine whether the contractual arrangements made by the parties are sufficient to discharge the mandate of § 204 and are consistent with the Act and its purposes. It is federal law which would determine whether a § 204 contract is valid and enforceable according to its terms. If these contracts are to serve this function under § 204, their validity, interpretation, and enforceability cannot be left to the laws of the many States, for it would be fatal to the goals of the Act if a contractual provision contrary to the federal command were nevertheless enforced under state law or if a contract were struck down even though in furtherance of the federal scheme.

Id. at 691. Accordingly, the Court concluded, "the § 204 contract . . . is a federal contract and is therefore governed and enforceable by federal law, in the federal courts." *Id.* at 692. Other decisions are to the same effect. *See, e.g., Norfolk & Western Ry. v. Nemitz,* 404 U.S. 37 (1971) (concluding that a dispute arising out of an agreement implementing obligations under the Interstate Commerce Act raised a federal question);

American Surety Co. v. Schultz, 237 U.S. 159 (1915) (holding that suit to enforce an appeal bond given to satisfy requirements of federal law raised a federal question).

This case is indistinguishable. Here, as in *Central Airlines*, it is federal law — specifically, §§ 251 and 252 — that determines whether the "contractual arrangements made by the parties are sufficient to discharge the mandate" of those sections; it is "federal law which would determine whether a [1996 Act interconnection agreement] is valid and enforceable according to its terms." *See* 47 U.S.C. § 252(e) (establishing federal standard for approval of interconnection agreements). Moreover, as with the § 204 contracts at issue in *Central Airlines*, 1996 Act interconnection agreements are Congress's chosen means for implementing the substantive duties contained in §§ 251 and 252: "[T]he federal statute is the source of the power and authority . . . . The enactment of the federal statute . . . is the governmental action . . . though it takes a private agreement to invoke the federal sanction." *Central Airlines*, 372 U.S. at 692 (ellipses and alteration in original; internal quotation marks omitted).[8] Finally,

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[8] Contrary to the Fourth Circuit's view (*see* Pet. App. 49a), this case is nothing like *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986). The plaintiffs in that case brought a state-law cause of action to vindicate rights established by state law; they claimed federal jurisdiction based only on the fact that the applicable standard of care under state law was based on a federal statute. It was conceded that Congress had "determin[ed] to preclude federal private remedies" for violation of the federal statute. *Id.* at 814. On the basis of that assumption, the Court held "simply . . . that the congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction." *Id.* Here, by contrast, the rights to be protected are federal rights, arising from federal contracts, to be construed in accordance with federal law.

the allegation here is that the PSC has interpreted the interconnection agreement in a manner "contrary to the federal command" (*id.* at 691) and, as the FCC has made clear in its *ISP Remand Order*, "fatal to the goals of the Act" (*id.*).

The Fourth Circuit — while apparently acknowledging that "interconnection agreements are 'creations of federal law'" (Pet. App. 49a) — paradoxically concluded that the construction of the contract presented "a matter of State contract law" (*id.* at 27a) that did not raise a federal question. The court sought support for its view in *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15 (1982). But, if anything, that case cuts in the opposite direction.

In *Jackson Transit*, this Court reaffirmed the principle that "suits to enforce contracts contemplated by federal statutes may set forth federal claims and that private parties in appropriate cases may sue in federal court to enforce contractual rights created by federal statutes." *Id.* at 22. The decisive question, the Court reasoned, is whether Congress intended the contracts at issue to be "'creations of federal law'" and "the rights and duties contained in those contracts [to] be federal in nature." *Id.* at 23 (quoting *Central Airlines*, 372 U.S. at 692). The circumstances here amply satisfy that standard.

Although the Court in *Jackson Transit* observed that "the statute seems to make § 13(c) agreements and collective-bargaining contracts creatures of federal law" (*id.*), the specific case at issue involved a contract between a local government and its employees. The Court determined that "labor relations between local governments and their employees are the subject of a longstanding statutory exemption" and that § 13(c) "evince[d] no congressional intent to upset" that

exemption. *Id.* at 23, 24. Finding the statute inconclusive, the Court relied on explicit and "conclusive" legislative history to determine that Congress had "intended that labor relations between transit workers and local governments would be controlled by state law" to be "applied in state courts." *Id.* at 24, 29.

Contrary to the Fourth Circuit's view, however, that is not the case here. Nothing in the text or legislative history of the 1996 Act supports the court's inference that, insofar as § 252(e)(6) does not apply, Congress intended the relations between incumbent carriers and CLECs to be governed by state law or "for the right of review to be exercised in State courts." Pet. App. 49a. On the contrary, as this Court has said, "[w]ith regard to the matters addressed by the 1996 Act," Congress "unquestionably" has "taken the regulation of local telecommunications competition away from the States." *AT&T*, 525 U.S. at 378 n.6.

Under the 1996 Act, the relationship between incumbents and competitors is governed by interconnection agreements that are binding as a matter of federal law. Because those agreements are central to the realization of Congress's goals, the rights and duties arising out of such agreements are matters of federal law under this Court's precedents. Accordingly, where a plaintiff's claim for relief depends on the construction of such an interconnection agreement, the claim arises under federal law for purposes of § 1331.

2. A separate line of this Court's precedents — holding that the construction of a federal tariff raises issues of federal law — likewise supports § 1331 jurisdiction in this case. Interconnection agreements under the 1996 Act serve essentially the same function as, and evince the central attributes of, federal tariffs. The Act requires incumbent LECs to negotiate such agreements on request (47 U.S.C. §§ 251(c)(1), 252(a)(1)), to include in each such agreement "a detailed schedule of itemized

charges" (*id.* § 252(a)(1)), to file approved agreements with the state commission for public inspection (*id.* § 252(h)), to provide service according to their terms (*id.* § 251(c)(2)(D), (c)(3)), and to make the same provisions available to all other telecommunications carriers on the same terms and conditions (*id.* § 252(i)). Those provisions directly parallel the requirements that the Communications Act of 1934 imposes with respect to traditional common-carrier services. Thus, common carriers must "furnish . . . communication service upon reasonable request" (*id.* § 201(a)), must include in each tariff "schedules showing all charges" (*id.* § 203(a)), must file tariffs with the FCC for public inspection (*id.*), must provide service solely according to their terms (*id.* § 203(b)), and must provide service on the same terms to all comers (*id.* § 202(a)).

In sum, 1996 Act interconnection agreements function in all material respects as federal tariffs. This Court's jurisdictional decisions concerning federal tariffs therefore bear directly on the issue here. And those decisions hold consistently that a claim involving interpretation or enforcement of a federal tariff necessarily arises under federal law and presents questions reviewable in federal court.

In this Court's leading decision on the subject, *Louisville & N.R.R. v. Rice*, the plaintiff railroad sued to recover money "claimed to be due under tariffs approved and published as required by [the] Interstate Commerce Act." 247 U.S. at 201. The district court dismissed the action for lack of jurisdiction, and this Court reversed. Noting that "[t]he Interstate Commerce Act requires carrier to collect and consignee to pay all lawful charges duly prescribed by the tariff," the Court concluded that "[t]heir duty and obligation grow out of and depend upon that act." *Id.* at 202. "The railroad company set up a claim based upon provisions of a tariff duly filed, published and approved

as required by Interstate Commerce Act; result of the action necessarily depended upon construction and effect of that act." *Id.* at 203. *See also Great Northern Ry. v. Merchants' Elevator Co.*, 259 U.S. 285, 290 (1922) ("Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of federal law.").

More recently, a unanimous Court reaffirmed that holding in *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.* As in *Rice*, the plaintiff common carrier sued to collect charges said to be owed under "tariffs on file with the [Interstate Commerce] Commission." 460 U.S. at 533. The district court dismissed the claim; the Ninth Circuit affirmed, characterizing the suit as a "simple contract-collection action." *Id.* (internal quotation marks omitted). This Court summarily reversed. Relying on *Rice*, the Court held that, in any case involving a claim under a federal tariff, "'the parties are held to the responsibilities imposed by the federal law, to the exclusion of all other rules of obligation.'" *Id.* at 535 (quoting *Rice*, 247 U.S. at 203). "A carrier's claim is, of necessity, predicated on the tariff" and therefore implicates the federal statute. *Id.*[9] This rule has been widely applied by the federal courts of appeals

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[9] Both *Rice* and *Thurston Motor Lines* involved the scope of federal jurisdiction under 28 U.S.C. § 1337. With the removal of the amount-in-controversy requirement in 28 U.S.C. § 1331, any claim "arising under any Act of Congress regulating commerce" (28 U.S.C. § 1337(a)) necessarily also "aris[es] under the . . . laws . . . of the United States" (*id.* § 1331). *See, e.g., ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 520 (3d Cir. 1998) ("[A]ny action that could be brought in federal court under § 1337 could also be brought under § 1331."); *Winstead v. J.C. Penney Co.*, 933 F.2d 576, 580 (7th Cir. 1991) (Posner, J.); 13B Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3574, at 236 & n.5 (2d ed. 1984).

to federal tariffs filed with the FCC pursuant to § 203 of the Communications Act.[10]

The same considerations that established federal jurisdiction in *Rice* and *Thurston Motor Lines* support federal jurisdiction here. An incumbent carrier's "duties and obligations" under a 1996 Act interconnection agreement, like its duties under a federal tariff, arise from federal law, and that is true even if, as here, the particular terms at issue were the result of "voluntary" negotiation rather than arbitration. As we have shown, such negotiations necessarily occur in the context of a statutory and regulatory regime that specifies the minimum terms to which state commissions will hold an incumbent carrier in the absence of a negotiated agreement. As the Fourth Circuit itself explained in a prior 1996 Act case, "many so-called 'negotiated' provisions represent nothing more than an attempt to comply with the requirements of the 1996 Act." *AT&T Communications*, 229 F.3d at 465.

Moreover, tariffs that are the product of negotiations are not for that reason immune from treatment as tariffs. For example, in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981), natural gas producers negotiated a price schedule with purchasers; the contract was filed with the Federal Power Commission, which authorized the sale. *Id.* at 573-74. The Court held that

[10] *See, e.g., Fax Telecommunicaciones Inc. v. AT&T*, 138 F.3d 479, 482, 488 (2d Cir. 1998); *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488-89 (7th Cir.) (Posner, J.), *cert denied*, 524 U.S. 952 (1998); *MCI Telecomms. Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1093-96 (3d Cir. 1995), *cert. denied*, 519 U.S. 815 (1996); *Western Union Int'l, Inc. v. Data Dev., Inc.*, 41 F.3d 1494, 1496 (11th Cir. 1995); *MCI Telecomms. Corp. v. Graham*, 7 F.3d 477, 479-80 (6th Cir. 1993); *MCI Telecomms. Corp. v. Garden State Inv. Corp.*, 981 F.2d 385, 387-88 (8th Cir. 1992). *See also AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 222 (1998) (noting that Communications Act's provisions "are modeled after similar provisions of the Interstate Commerce Act . . . and share its goal of preventing unreasonable and discriminatory charges").

the filed rate doctrine applied fully to those rates. *Id.* at 577-79. *See also* 47 C.F.R. § 61.55 (governing "contract-based tariffs"); *Fax Telecommunicaciones*, 138 F.3d at 482, 488; *MCI Telecomms. Corp. v. FCC*, 917 F.2d 30, 38 (D.C. Cir. 1990) ("rates arrived at through negotiations between a carrier and an individual customer and then made generally available to other similarly situated customers" are lawful tariffs if "filed with the FCC"); *Sea-Land Service, Inc. v. ICC*, 738 F.2d 1311, 1316-19 (D.C. Cir. 1984).

It follows that 1996 Act interconnection agreements, like federal tariffs, are governed by federal law. A claim challenging a state agency's interpretation of such an agreement therefore arises under federal law and is subject to the § 1331 jurisdiction of the federal courts.

II. NO OTHER PROVISION OF LAW DEPRIVES FEDERAL COURTS OF JURISDICTION OVER CLAIMS LIKE VERIZON'S

Because Verizon's claims arise under federal law, the requirement for district court jurisdiction under 28 U.S.C. § 1331 is satisfied. The sole remaining question, therefore, is whether any other provision of law withdraws that federal jurisdiction.

The Fourth Circuit invoked two possible statutory limitations. First, the court held that § 252(e)(6) does not apply to state commission decisions interpreting or enforcing interconnection agreements. It then inferred that, because "Congress created a limited federal right of review of State commission determinations as defined in 47 U.S.C. § 252(e)(6)," it must have "intended for the right of review to be exercised in State courts" whenever § 252(e)(6) does not apply. Pet. App. 49a. Second, the Fourth Circuit believed that, "in the absence of specific federal authorization," it would "violate basic tenets of federalism" to permit a federal

court to "review a State quasi-judicial body." *Id.* at 50a.[11]

For the reasons set forth below, neither of these sources of law bars a district court's exercise of subject matter jurisdiction in this case.

A. Section 252(e)(6) Does Not Withdraw Subject Matter Jurisdiction from the Federal Courts

Verizon has consistently maintained that § 252(e)(6) provides an explicit cause of action for parties aggrieved by any determination of a state commission concerning the scope of a carrier's duties under the 1996 Act, including determinations that involve the interpretation and enforcement of interconnection agreements. But on the assumption, for purposes of this case, that § 252(e)(6) does not reach such determinations, the proper conclusion is that judicial review is

[11] Because defendants in the district court included state officers, this case also presents the question whether "the relief sought against the officer is not, in substance, sought against the sovereign." *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299, 304 (1952). This Court, however, limited its grant in this case to Question 2 presented by each petition for a writ of certiorari, thereby omitting the question "[w]hether the *Ex parte Young* doctrine permits an action against the members of a state public utility commission in their official capacity to enjoin ongoing violations of federal law in their performance of federal regulatory functions." No. 00-1531 Pet. i. Verizon therefore will not discuss the *Ex parte Young* issue in this brief. Instead, Verizon (along with two others) has filed a brief as *amici curiae* in No. 00-878, where it will explain that the relief sought here — an injunction against enforcement of an unlawful adjudicatory order — falls squarely within the rule of *Ex parte Young*. Even if the Court were to hold (in No. 00-878) that *Ex parte Young* does not permit an action against the state commissioners, the Court would still have to vacate the Fourth Circuit's judgment and remand for consideration of the question whether Verizon's suit could proceed against the private party defendants. The Fourth Circuit itself suggested that an action for review of the PSC's ruling might proceed without the presence of the PSC or its commissioners. *See* Pet. App. 15a. This "uncertainty surrounding the indispensable-party issue" (*id.*) would have to be resolved before Verizon's case could be dismissed.

nonetheless appropriate under the district court's general federal-question jurisdiction.

The "strong presumption" is that, when Congress delegates power to an executive agency, "Congress intends judicial review of administrative action." *Bowen*, 476 U.S. at 670. As the Court has explained, "[w]hen . . . definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law, the silence of Congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction." *Stark v. Wickard*, 321 U.S. at 309 (footnote omitted). "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Labs.*, 387 U.S. at 141.

There is no such evidence here. Contrary to the Fourth Circuit's understanding, "[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent." *Id.* (internal quotation marks omitted).

In *Bowen*, for example, respondents had filed an action challenging the validity of a Medicare regulation on statutory and constitutional grounds. The government argued that Congress had "forbidden judicial review of all questions affecting the amount of benefits." 476 U.S. at 669. But, the Court held, the fact that Congress had "carefully detail[ed] the forum and limits of review" concerning determinations of the *amount* of benefits simply "does not speak to challenges mounted against the *method* by which such amounts are to be determined rather than the *determinations*

themselves." *Id.* at 675. Accordingly, all eight participating Justices agreed that the "presumption" that Congress "expects the courts to grant relief when an executive agency violates [its statutory commands]" controlled the case. *Id.* at 681.

Stark v. Wickard likewise supports jurisdiction here. The statute at issue included several specific judicial review provisions, none of which applied to the petitioners' challenge. 321 U.S. at 307-08. Far from reading these judicial review provisions as exclusive, the Court interpreted them as evidencing the "recognition by Congress of the applicability of judicial review in this field," a reading that militated *against* an interpretation of the statute that would "bar[] from the courts an otherwise justiciable issue." *Id.* at 309.

In the Fourth Circuit's view, the absence of a specific provision in the 1996 Act authorizing federal court review for state commission determinations (other than an initial approval or rejection) indicated that Congress intended state court review under state statute to be a party's sole remedy when such a determination violates federal law. *See* Pet. App. 35a. But there is nothing in the statutory language to support such an inference. On the contrary, the 1996 Act's sole mention of state courts is in a provision specifically *withdrawing* the authority of state courts to hear cases that arise out of state commission determinations under the 1996 Act. *See* 47 U.S.C. § 252(e)(4) ("No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section."). Even assuming for purposes of this case that § 252(e)(4) and (e)(6) do not reach the determination at issue here, the fact that Congress specifically designated federal courts as the *exclusive* forum for review in certain situations cannot support an inference that Congress intended to withdraw federal jurisdiction in other situations.

That conclusion is reinforced because Congress has demonstrated in other contexts that, when it wants to withdraw federal jurisdiction and designate state courts as the exclusive forum for reviewing administrative determinations under a federal statute, it plainly knows how to do so. For example, the Public Utility Regulatory Policies Act of 1978 contains a provision specifically limiting federal court jurisdiction except in designated circumstances. *See* 16 U.S.C. § 2633(a) ("[n]otwithstanding any other provision of law, no court of the United States shall have jurisdiction over any action arising under any provision of subchapter I or II of this chapter or of this subchapter" with specific exceptions). Likewise, the Trade Act of 1974 provides that "[a] determination by a cooperating State agency with respect to entitlement to program benefits . . . is subject to review in the same manner and to the same extent as determinations under the applicable State law and only in that manner and to that extent." 19 U.S.C. § 2311(d); *see International Union, United Automobile Workers v. Brock*, 477 U.S. 274, 293 (1986) (White, J., dissenting) ("Congress thus expressed the intent that . . . the agency and state courts shall have exclusive jurisdiction").

The absence of a comparable provision in this statute is significant for two reasons. First, that Congress has included such provisions in other statutes reveals its understanding that, in the absence of limiting language, federal court jurisdiction extends to any determination that a state agency makes in its administration of a federal statute; otherwise, such provisions would be surplusage. Second, the fact that Congress chose *not* to include such a provision here indicates that Congress intended federal courts to exercise their subject matter jurisdiction in this area to the fullest extent.

Moreover, even if a state has an applicable procedure for judicial review, that says nothing about whether the presence of state jurisdiction should be read to foreclose review in federal court. The Court made this point in *Smyth v. Ames*, 169 U.S. 466 (1898), in which a railroad had brought an action to enjoin the state board of transportation (among others) from enforcing a railroad rate that was said to be unconstitutional. *See id.* at 469-70. The defendants argued that federal jurisdiction was not available because the plaintiffs had an adequate remedy under state law. *See id.* at 478. The Court rejected the argument: "One who is entitled to sue in the federal circuit court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action." *Id.* When a plaintiff seeks review of state agency action on the ground that it violates federal law, "if it prefers to entrust the final decision to the Courts of the United States rather than to those of the State [it] has a right to do so." *Railroad & Warehouse Comm'n v. Duluth Street Ry.*, 273 U.S. 625, 628 (1927); *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 293 (1997) (O'Connor, J., concurring in part and concurring in the judgment) (noting that the doctrine of *Ex parte Young* has been applied to authorize federal jurisdiction "[e]ven if there is a prompt and effective remedy in a state forum") (alteration in original; internal quotation marks omitted).

Indeed, in the circumstances presented here, even if Verizon has pursued a *cause of action* under state law, the district court had subject matter *jurisdiction*, because Verizon's "complaint established that its right to relief . . . requires resolution of a substantial question of federal law." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13 (1983). As

noted above, there can be no question that the underlying claims of right in Verizon's suit are federal — including the significance of § 252(a)(1) and the duties imposed under the parties' 1996 Act interconnection agreement.[12] Accordingly, Verizon's claims "'arise under' the laws of the United States" and "unquestionably" present a federal question under § 1331; the suit may therefore be brought in federal court. *City of Chicago*, 522 U.S. at 164.

B. The *Rooker-Feldman* Doctrine Does Not Bar Federal Judicial Review of State Administrative Action

Contrary to the Fourth Circuit's view, the *Rooker-Feldman* doctrine does not apply to this case. The court of appeals acknowledged that "strict application of the doctrine requires a final judgment from State courts," but it nonetheless believed that "the federal intrusion into State affairs is not any less when the judgment issues from a State quasi-judicial body." Pet. App. 50a. As this Court made clear in *City of Chicago*, however, it is entirely appropriate — indeed, commonplace — for federal courts to review state administrative action in the first instance, even if a state procedure for review is available.

City of Chicago involved an adjudication by Chicago's Historical and Architectural Landmarks Commission that two of respondent's buildings qualified for landmark status under the applicable ordinance. 522 U.S. at 159-60. Respondents filed an action for judicial review under the state administrative review law, alleging that the statute — both on its face and as applied — was unconstitutional and that the proceedings

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[12] In addition, because the parties' obligations precisely track obligations imposed under § 251(b)(5), Verizon's cause of action necessarily requires the resolution of the obligations imposed under that federal provision.

also had violated the constitution. *Id.* at 160. The complaint also sought relief on purely state-law grounds. *Id.* Petitioners removed the action on the basis of federal-question jurisdiction, and the district court denied a motion to remand. *Id.* at 161. The Seventh Circuit reversed, holding that a federal court lacked jurisdiction to engage in deferential review of state agency action. *Id.* at 162 (noting that the Seventh Circuit had determined that "a proceeding to review state administrative action under a deferential standard is not a 'civil action'").

This Court reversed. First, the Court held that, even though respondent had invoked a state cause of action, its claims arose under federal law because "a 'right or immunity created by the Constitution or laws of the United States [was] an element, and an essential one, of the plaintiff's cause of action.'" *Id.* at 164 (quoting *Gully*, 299 U.S. at 112). Second, the Court held that the district court had supplemental jurisdiction over any claims that arose under state law (*id.* at 165-66) — for example, the state-law claim that the Chicago Landmarks Commission had misapplied its ordinances.

The Court rejected the argument that the federal court was deprived of jurisdiction because an action for on-the-record review was not a "civil action[]" within the "original jurisdiction" of the district court for purposes of the removal statute: it held that, even if its "state claims" were not civil actions, its federal claims were. Just as important for present purposes, the Court made clear that an action to secure "judicial review of state administrative decisions" is "generally encompasse[d]" within federal subject matter jurisdiction under § 1331. *Id.* at 169. As the Court noted, "district courts routinely conduct deferential review pursuant to their original jurisdiction over federal questions, including on-the-record review of federal administrative action." *Id.* at 171. *See also Shields*,

305 U.S. at 184 ("respondent was entitled to resort to equity in order to obtain a judicial review of the questions of the validity and effect of the [Interstate Commerce] Commission's determination").

City of Chicago makes clear that *Rooker-Feldman* is inapplicable to the circumstances presented here. That doctrine applies to situations where a state *court* renders a final judgment; in such circumstances, Congress intends that the sole avenue into federal court should be a petition for certiorari invoking the explicit authority of the Supreme Court to review the judgments of "the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). But § 1257 makes no mention of administrative agencies, and *City of Chicago* itself involved administrative determinations made pursuant to established standards; both the determinations and the standards were said to violate the federal constitution. Whether or not administrative action involves an adjudicative function, and whether or not such action is subject to review in state court, a federal forum is available for claims that such administrative action has violated federal law.

The conclusion that the exercise of federal jurisdiction is appropriate is even clearer in this case than it was in *City of Chicago* for two reasons. First, the agency action here was undertaken in the exercise of authority granted under *federal* law. Contrary to the Fourth Circuit's understanding, nothing in Maryland law authorizes the PSC to hear a complaint against Verizon alleging a violation of *federal* law. On the contrary, the provision of Maryland law on which the Fourth Circuit relied makes clear that a person may file a complaint only to "allege a violation *of this article*" — *i.e.*, the state statute, not the 1996 Act. Md. Code Ann., Pub. Util. Cos. § 3-102(a)(2) (1998) (emphasis added). Nothing in the complaint underlying this case alleged that Verizon had violated any

provision of the Maryland Public Utility Companies law; instead, the allegation was that Verizon had violated the 1996 Act and the parties' 1996 Act interconnection agreement.

Accordingly, it was only to the extent that federal law authorized the administrative complaints at issue here that preliminary resort to the PSC was appropriate. As every other federal court to consider the question has agreed, a state commission's authority to consider such complaints derives from its authority under § 252 to arbitrate and approve interconnection agreements. *See Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 947 (8th Cir. 2000) ("we can reach no conclusion but to agree with the FCC's determination that the state commissions' power to enforce interconnection agreements springs from § 252"); *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 338 (7th Cir. 2000) ("[a] state commission's authority to approve or reject interconnection agreements under the Act necessarily includes the authority to interpret and enforce, to the same extent, the terms of those agreements"), *cert. denied*, 121 S. Ct. 896 (2001); *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 208 F.3d 475, 479-80 (5th Cir. 2000) ("[T]he Act's grant to the state commissions of plenary authority to approve or disapprove . . . interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved.").

The conclusion that the delegation of federal authority to state commissions includes the power to interpret and enforce interconnection agreements reflects the settled principle that the agency entrusted with making the policy judgments inherent in overseeing the approval of a federal tariff is likewise the exclusive original tribunal for claims that require construction of disputed terms. *United States v. Western Pac. R.R.*,

352 U.S. 59, 65-66 (1956); *Great Northern*, 259 U.S. at 291. In this case, the issue presented — the meaning of the interconnection agreement provision requiring reciprocal compensation "as . . . required by the Act" and limiting such compensation to "local traffic" as specifically defined in keeping with FCC regulations — involved the type of issue that must be resolved in the first instance by the agency with "the law-making power over certain aspects of commercial relations." *Western Pac.*, 352 U.S. at 65 (internal quotation marks omitted). The courts have therefore correctly concluded that the type of determination at issue here is one made under the authority delegated by federal law. Accordingly, the PSC was acting as a *federal* agency, not merely as a state agency, because it was exercising a power delegated by Congress, not the state. The rule of *Califano v. Sanders*, 430 U.S. 99 (1977), that "federal district courts may engage in on-the-record, substantial evidence review of federal agency actions under § 1331" (*City of Chicago*, 522 U.S. at 183 (Ginsburg, J., dissenting)) fully applies here.

Second, unlike *City of Chicago*, where the plaintiff had raised both federal and state-law challenges to state administrative action taken under state law, this case raises *no* issue of state law. The administrative scheme at issue here is exclusively federal, and the obligations imposed by the interconnection agreements at issue are likewise exclusively federal. *See supra* at 20-29. Accordingly, the only legal issues presented are matters of federal law. Forcing Verizon to litigate these issues in state court — whether or not the state court properly has jurisdiction — "would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts." *England v. Louisiana State Board of Med. Examiners*, 375 U.S. 411, 415 (1964).

For the same reason, the principles underlying abstention doctrine could not support a federal court's refusal to exercise jurisdiction in this case. Because the issues here are ones purely of federal law, this case "does *not* demand significant familiarity with, and will not disrupt state resolution of, distinctively local regulatory facts or policies." *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 364 (1989). In such circumstances, the district court must exercise the federal jurisdiction conferred by Congress.

CONCLUSION

The judgment of the court of appeals should be reversed.

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September 10, 2001

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Nos. 00-1531 and 00-1711

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IN THE

Supreme Court of the United States

VERIZON MARYLAND INC., and
UNITED STATES OF AMERICA,
Petitioners,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENTS MCI WORLDCOM, INC. AND MCIMETRO ACCESS TRANSMISSION SERVICES LLC IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a federal district court has subject matter jurisdiction under 28 U.S.C. § 1331 to determine whether a state commission's action interpreting or enforcing an interconnection agreement violates the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.*

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondents MCI WORLDCOM, Inc., and MCImetro Access Transmission Services LLC, state as follows:

MCI WORLDCOM, Inc. is now known as WorldCom, Inc. WorldCom, Inc. is a Georgia corporation that, through its wholly owned subsidiaries, provides local, long distance, and other telecommunications services domestically and internationally. WorldCom, Inc. is a publicly traded company on the NASDAQ National Market under the symbols "WCOM" and "MCIT." WorldCom, Inc. has no parent corporations. No publicly held company owns 10 percent or more of WorldCom, Inc.'s stock. WorldCom, Inc. owns controlling interests in Embratel Participacoes, S.A., and Digex, Incorporated, both of which issue shares to the public.

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IN THE

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VERIZON MARYLAND INC. and
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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF RESPONDENTS MCI WORLDCOM, INC. AND MCIMETRO ACCESS TRANSMISSION SERVICES LLC IN SUPPORT OF PETITIONERS

Respondents MCI WORLDCOM, Inc., and MCImetro Access Transmission Services LLC (collectively "WorldCom"), through undersigned counsel, submit this brief in support of petitioners, seeking reversal of the decision of the United States Court of Appeals for the Fourth Circuit in *Bell Atlantic Maryland, Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279 (4th Cir. 2001), Pet. App. 1a-72a. As we show, the Fourth Circuit erroneously held that federal courts lack subject matter jurisdiction under 28 U.S.C. § 1331 to entertain federal law challenges to state commission determinations enforcing pre-

existing interconnection agreements between competing local carriers.

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and 47 U.S.C. § 252(e)(6) to review the determination of the Public Service Commission of Maryland ("PSC") for compliance with federal law.

The judgment of the court of appeals was entered on February 14, 2001. Petitions for writs of certiorari were timely filed on April 5, 2001 (by Verizon Maryland Inc.), and on May 15, 2001 (by the United States). The petitions were granted, and the cases consolidated, on June 25, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT

Verizon Maryland Inc. ("Verizon") filed this action in federal district court against WorldCom and a number of other competing carriers, the PSC, and individual PSC Commissioners ("Commissioners"), challenging the PSC's June 11, 1999, Order enforcing the "interconnection agreement" entered into between Verizon and MFS Intelenet of Maryland ("MFS"), pursuant to the Telecommunications Act of 1996 ("1996 Act" or "Act"), Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.*[1] Verizon's complaint alleged, *inter alia*, that the PSC's Order violates the 1996 Act

[1] MFS later was acquired by WorldCom. Verizon was formerly known as Bell Atlantic Maryland, Inc., the name which appears in the decision of the court below.

and various implementing regulations of the Federal Communications Commission ("FCC").

1. The Statutory Scheme

The 1996 Act fundamentally changed the regulation of the local telephone industry throughout the country. In the Communications Act of 1934, Congress left regulation of intrastate telecommunications primarily to the states. *See* 47 U.S.C. § 152(b); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986). The states, in turn, historically granted exclusive franchises to incumbent local telephone companies like Verizon. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999); H.R. Rep. No. 104-204, at 49 (1995).

Congress enacted the 1996 Act for the express purpose of ending this monopoly regime and promoting a competitive market for local telephone service. *See AT&T Corp.*, 525 U.S. at 371. Toward that end, the 1996 Act partially supplants state regulation and imposes a new set of substantive federal standards and procedures governing interconnection between incumbent local companies and potential competitors. *Id.* at 371-73. Congress thus altered the prior balance of federal and state regulatory authority in the area of local telecommunications. *Id.* at 371.

Under the Act, a new entrant that wishes to enter a local telephone market must contact the incumbent carrier to negotiate the terms of interconnection. *See* 47 U.S.C. § 252(a)(1). If the two carriers cannot reach an agreement, they must ask the governing state commission to conduct an "arbitration" to resolve disputed issues. *Id.* § 252(b)(1). The results of the negotiation and arbitration process are memorialized in an "interconnection agreement" between the

carriers, which is then submitted for approval to the state commission. *Id.* § 252(e).

Although the Act supplies minimum requirements that state commissions must follow in arbitrating provisions about which the parties cannot reach a negotiated agreement, parties may negotiate terms "without regard" to these requirements. *Id.* § 252(a)(1). When parties voluntarily agree to terms, a state commission may reject the terms only if they are discriminatory or against the public interest, convenience, or necessity. *Id.* § 252(e)(2)(A); *see also AT&T Corp.*, 525 U.S. at 371-73.

Thus, in the spirit of cooperative federalism, Congress vested the FCC with the primary authority to implement the federal standards created by the Act, *AT&T Corp.*, 525 U.S. at 377-84 & n.5; 47 U.S.C. §§ 201(b), 251(d)(1), while at the same time, carving out a new, voluntary role for states in overseeing interconnection agreements. The Act in no way requires state commissions to help implement the new federal scheme. If a state commission declines to participate, the FCC will assume that function. 47 U.S.C. § 252(e)(5).

Whether rendered by a state commission or the FCC, agency determinations regarding the terms of interconnection agreements are subject to review in federal court for compliance with the Act. If a state commission elects to participate in the Act's implementation, "any party aggrieved . . . may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section[s] 251 . . . and [252]." 47 U.S.C. § 252(e)(6); *see also AT&T Corp.*, 525 U.S. at 378 n.6 ("there is no doubt . . . that if the federal courts believe a state

commission is not regulating in accordance with federal policy they may bring it to heel").[2]

2. Nature of the Dispute

This case concerns one aspect of the parties' interconnection agreement, known as "reciprocal compensation," which is the payment that a local carrier receives for completing a call for another local carrier. With local competition, customers of one local carrier will call customers of another. Carriers must therefore assist each other in delivering calls. When a customer of one local carrier makes a call to a customer of another local carrier, only the caller pays its carrier for the telephone services, leaving the other carrier uncompensated. The caller's local carrier therefore must compensate the other carrier whose facilities are used to complete the call. *See* 47 U.S.C. § 251(b)(5); *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 2-3 (D.C. Cir. 2000).

Verizon and MFS agreed in their negotiated interconnection agreement to pay each other reciprocal compensation for the exchange of "Local Traffic." Pet. App. 95a. Local Traffic is defined in the parties' interconnection agreement as a call within a given local calling area, or expanded area service ("EAS") area, to another local telephone number. Pet. App. 95a. The dispute in this case was whether calls by local customers of one carrier that are routed by another carrier to its local customers operating as "Internet Service Providers" ("ISPs") constitute "Local Traffic" as defined in the interconnection agreement.

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[2] If the FCC has acted in lieu of a state commission, its determinations are reviewed by a federal court of appeals under the Hobbs Act. *See* 28 U.S.C. § 2342(1).

The parties' interconnection agreement was approved by the PSC on October 9, 1996. In April 1997, after operating under the approved agreement for over six months, Verizon announced that it was unilaterally stopping reciprocal compensation payments for calls to local ISPs, claiming for the first time that such calls are not "Local Traffic." Pet. App. 94a. In response, MFS filed a complaint with the PSC to enforce the agreement by requiring Verizon to resume payments of reciprocal compensation for ISP calls. *Id.* On September 11, 1997, the PSC issued a letter order in which it ruled that the plain language of the agreement mandated payment of reciprocal compensation for calls to ISPs. *Id.* at 95a-97a.[3] Verizon appealed that order under Maryland state law to the Montgomery County Circuit Court, which affirmed the order in its entirety. Verizon did not file suit in federal court. Compl. ¶ 34.[4]

On February 26, 1999, the FCC issued a Declaratory Ruling (the "*ISP Order*") in which it held that a carrier's right to reciprocal compensation for calls to ISPs is governed by the terms of the parties' interconnection agreement. Pet. App. 96a-97a.[5] The FCC found that parties are "bound by their existing

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[3] On December 2, 1998, Sprint Communications Company, LP ("Sprint") filed a complaint with the PSC alleging that Verizon unlawfully refused to enter into an interconnection agreement unless it stated that calls to ISPs are not local and not subject to reciprocal compensation. Pet. App. 96a. On February 9, 1999, the PSC ruled that calls to ISPs are in fact "local in nature" and subject to reciprocal compensation. *Id.*

[4] *See* Civil Action No. 178260, Docket Entry No. 36 (Cir. Ct. Montgomery County, Md. March 26, 1998). Compl. ¶ 34.

[5] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-*
(continued...)

interconnection agreements, as interpreted by state commissions," including those that require payment of reciprocal compensation for calls to ISPs. *Id.* at 97a (internal quotation and citation omitted). The FCC further held that there is "no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic." *ISP Order* ¶ 21. The FCC also described several factors that state commissions might consider in determining whether parties had agreed in their interconnection agreements to pay reciprocal compensation for calls to ISPs, including the fact that for years, both the FCC and incumbent carriers traditionally had treated calls to ISPs as local. *Id.* ¶¶ 23-24; Pet. App. 97a-99a. The FCC concluded, however, (i) that calls to ISPs are "jurisdictionally mixed," (ii) that a substantial portion of ISP-bound traffic is interstate for jurisdictional purposes, and (iii) that the Act did not mandate that reciprocal compensation be paid for these calls.[6] *ISP Order* ¶¶ 1, 22; Pet. App. 96a.

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[5] (...continued)
Bound Traffic, 14 F.C.C.R. 3689 (1999) ("*ISP Order*"), *vacated*, *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 9 (D.C. Cir. 2000).

[6] At WorldCom's request, the D.C. Circuit vacated that order for want of reasoned decision making. *Bell Atlantic Tel. Cos.*, 206 F.3d at 9. The FCC recently has concluded that the Act does not require reciprocal compensation for these calls, established prospectively a new federal compensation regime for this traffic, and determined that its new order does not affect preexisting contract obligations or state commission decisions like those at issue in this case. *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, FCC 01-131 (rel. Apr. 27, 2001). WorldCom and other parties have appealed that decision to the D.C. Circuit. *WorldCom, Inc. v. FCC*, No. 01-1218 (D.C. Cir. filed May 17, 2001).

On March 3, 1999, Verizon petitioned the PSC for an order declaring that the *ISP Order* "conclusively establishe[d]" that calls to ISPs are not local and not subject to reciprocal compensation under the terms of its various interconnection agreements with MFS and others. *Petition for Declaratory Order that Internet Traffic is not "Local" Traffic Subject to Reciprocal Compensation*, No. 8731, at 9 (PSC of Md. filed Mar. 3, 1999); Pet. App. 91a. On June 11, 1999, the PSC denied Verizon's petition and rejected its contention that the FCC's *ISP Order* dictated whether or not reciprocal compensation was owed for calls to ISPs. Pet. App. 99a. The PSC thus affirmed its earlier determination that Verizon owed MFS reciprocal compensation for calls to ISPs under the terms of parties' interconnection agreement. Pet. App. 107a. The PSC also required Verizon to pay reciprocal compensation for calls to ISPs, on an interim basis, to any carrier with whom Verizon did not have an interconnection agreement specifying that such payments were not required. *Id.*[7]

3. The District Court Proceedings

On July 14, 1999, Verizon filed suit in the United States District Court for the District of Maryland against the PSC, the individual PSC Commissioners (collectively, the "PSC Defendants"), and various competitors, including WorldCom and MFS, to challenge the PSC's determination. Verizon sought declaratory and injunctive relief under 47 U.S.C. § 252(e)(6). Verizon asserted jurisdiction under both § 252(e)(6) and 28 U.S.C. § 1331. Compl. ¶ 21. Both counts of the complaint alleged violations of federal law. Compl. ¶¶ 40, 42. In Count One, Verizon alleged that the PSC's

[7] This was based in part on the PSC's determination that, unless the parties have negotiated a contrary arrangement, for the PSC "[t]o fail to provide for any compensation would violate the 1996 Act." Pet. App. 106a.

determination that Verizon owed reciprocal compensation under its agreement with MFS violated the 1996 Act and the FCC's *ISP Order* as well as the terms of the agreement itself. Compl. ¶¶ 1, 5-7, 40. In Count Two, Verizon alleged that the PSC's decision to require reciprocal compensation where the parties lacked an agreement also violated the 1996 Act and the FCC's *ISP Order*. Compl. ¶¶ 1, 5-7, 42.[8] Numerous allegations relating to both counts described Verizon's view of the federal requirements. Compl. ¶¶ 3, 4, 5, 7, 25, 31-32, 37-38.

After briefing by the parties, the District Court granted the PSC Defendants' motion to dismiss on the grounds that those Defendants were immune from suit under the Eleventh Amendment and that the case could not proceed under Federal Rule of Civil Procedure 19(b) because they were indispensable parties. Pet. App. 77a-86a. The district court also held that Count Two of Verizon's complaint was unripe. Pet. App. 86a-90a. The court refused to address the PSC Defendants' argument that the court lacked subject matter jurisdiction under section 252(e)(6), Pet. App. 76a, and noted that it was not "willing to recognize an independent federal cause of action under § 1331," Pet. App. 90a.

4. The Fourth Circuit's Decision

A divided panel of the United States Court of Appeals for the Fourth Circuit affirmed. *Bell Atlantic Maryland, Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279 (4th Cir. 2001), Pet. App. 1a-72a. Parting ways with every federal court of appeals to

[8] Verizon also alleged that both determinations were arbitrary and capricious and not the result of reasoned decision making. Compl. ¶¶ 40, 42.

have addressed the issue, the court first held that the PSC Defendants were immune from suit in federal court because (1) the PSC had not waived its Eleventh Amendment immunity by voluntarily participating in the administration of interconnection agreements under the 1996 Act and (2) suit against the individual commissioners could not proceed under *Ex parte Young*. Pet. App. 8a-30a. In ruling on the immunity issues, the court repeatedly concluded that the PSC Defendants were not indispensable parties to a suit for review of a PSC determination under the 1996 Act. The court then held that it lacked subject matter jurisdiction under section 252(e)(6) because that section granted federal courts jurisdiction to review only state commission determinations approving or rejecting interconnection agreements, not determinations enforcing previously approved agreements. Pet. App. 30a-47a.

Finally, the court held that it also lacked subject matter jurisdiction under 28 U.S.C. § 1331. Pet. App. 47a-50a. The court rested this conclusion on three grounds. First, it looked to section 601(c) of the Act, which provides that the Act "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided." Pub. L. No. 104-104, § 601(c), *reprinted at* 47 U.S.C. § 152 note; Pet. App. 48a. The Fourth Circuit, however, read section 601(c) as preserving only state, not federal, law. Pet. App. 48a (stating that section 601(c) "states that the Act is not to be construed 'to modify, impair or supersede . . . state, or local law *unless expressly so provided*'") (emphasis and ellipsis omitting the word "federal" supplied by the court). Pet. App. 39a. Combining this reading of section 601(c) with its narrow construction of section 252(e)(6), the court concluded that Congress must have intended section 252(e)(6) as a limit on the federal courts' jurisdiction under section 1331. Pet. App. 48a. According to the court, therefore, it would be "nonsensical" to conclude that

Congress intended federal questions not encompassed by section 252(e)(6) to be heard in federal court. *Id.* Second, the court reasoned that the federal interest in federal claims arising out of interconnection agreements under the 1996 Act was not "sufficiently substantial . . . to confer jurisdiction under 28 U.S.C. § 1331." Pet. App. 48a-50a. Third, the court intimated that under the principles of the *Rooker-Feldman* doctrine, review in federal court under section 1331 of a state commission's determination interpreting and enforcing an interconnection agreement under the 1996 Act could effectuate an impermissible "federal intrusion into State affairs."[9] Pet. App. 50a.

In a strongly worded dissent, Judge King disagreed with every one of the majority's holdings, characterizing the majority opinion as being in "defiance" of this Court's clear admonitions and unnecessarily injecting "equivocation" and "chaos" "where once there was certitude." Pet. App. 52a. Judge King rejected the majority's "narrow construction" of section 252(e)(6) and reasoned, in accord with every other court of appeals to have reached the issue, that the grant of authority in section 252(e)(6) "necessarily includes the power to enforce the interconnection agreement." Pet. App. 55a (internal quotation and citation omitted). In addition, Judge King concluded that because two counts in Verizon's complaint expressly alleged violations of federal law, its complaint unquestionably arose under federal law. Pet. App. 56a-57a.

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[9] On the same day, the Fourth Circuit issued a companion decision in a case involving an ISP dispute in North Carolina. *BellSouth Telecommunications, Inc. v. North Carolina Utils. Comm'n*, 240 F.3d 270 (4th Cir. 2001), *petition for cert. filed*, 69 U.S.L.W. 3740 (U.S. May 14, 2001) (No. 00-1699). Both the issues and the court's analysis in that case were identical in all material respects to the issues and the decision in the *Bell Atlantic* case below.

Judge King summarized his disagreement with the majority as follows:

> Unfortunately, by its holding that federal court jurisdiction is limited to reviewing the approval and rejection of interconnection agreements by State commissions, the majority will create a confusing and unworkable scheme of federal and state review that is bound to produce absurd results. First, as the Tenth Circuit explained:
>
> A rule that restricted a district court's jurisdiction to review of a state commission's approval or rejection of an interconnection agreement would lead to results that Congress could not have intended. Under such a rule, certain state commission decisions would escape federal review simply because the dispute arose after the agreement had been approved. *Brooks Fiber Communications*, 235 F.3d at 497.
>
> Second, the majority's holding – if imprudently followed across the country – could result in fifty states reaching fifty different conclusions about the interpretation of an important federal statute. And, finally, the majority's position undermines, and renders entirely meaningless, the recent explicit statement of Justice Scalia that "there is no doubt . . . that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *Iowa Utils. Bd.*, 525 U.S. at 379 n.6.

Pet App. 57a-58a.[10/]

Both Verizon and the United States filed petitions for certiorari, presenting the same four questions: (i) whether a state commission decision enforcing and interpreting an interconnection agreement is a determination under section 252(e)(6); (ii) whether federal courts have jurisdiction over such decisions pursuant to 28 U.S.C. § 1331; (iii) whether the PSC waived its immunity by voluntarily participating in the administration of the Act; and (iv) whether suit against the Commissioners was proper under *Ex parte Young*. Pet. of United States at I; Pet. of Verizon at i. On June 25, 2001, the Court granted both petitions, limited to the second question presented: Whether a federal district court has subject matter jurisdiction under 28 U.S.C. § 1331 to determine whether a state commission's action interpreting or enforcing an interconnection agreement violates the 1996 Act.[11/] *See* 121 S. Ct. 2548 (2001). The cases were then consolidated by the same order. *Id.*

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[10] Judge King also rejected the majority's conclusions that the PSC Defendants were entitled to Eleventh Amendment immunity and that suit could not be maintained under the doctrine of *Ex parte Young*. Pet. App. 58a-72a.

[11] *See* Pet. of United States at I. Verizon, in its petition, formulated the question as follows: "Whether, if 47 U.S.C. § 252(e)(6) does not apply, a federal district court has independent subject matter jurisdiction under 28 U.S.C. § 1331 to determine whether a state public utility commission's action interpreting or enforcing an interconnection agreement violates the Telecommunications Act of 1996." *See* Pet. of Verizon at i.

This case is closely related to *Mathias v. WorldCom Technologies, Inc.*, No. 00-878, which also is currently before the Court. There, on review of a Seventh Circuit decision arising out of similar facts, the Court is considering issues also decided below by the Fourth Circuit – including whether section 252(e)(6) of the 1996 Act provides federal jurisdiction for review of state commission determinations interpreting or enforcing an interconnection agreement, whether the Eleventh Amendment precludes suit against state commissioners to remedy alleged violations of federal law, and whether suit against the individual state commissioners may proceed under *Ex parte Young*. *See Mathias v. WorldCom Technologies, Inc.*, 121 S. Ct. 1224 (2001). The Fourth Circuit in this case and the Seventh Circuit in *Mathias* reached opposite conclusions on those questions.

SUMMARY OF THE ARGUMENT

In this case, the Court has granted review to consider only the question whether, if section 252(e)(6) does not apply, federal courts have general federal question jurisdiction under 28 U.S.C. § 1331 to address claims by carriers that the decision of a state commission interpreting or enforcing an interconnection agreement violates federal law. As we explain in our *Mathias* brief, actions filed by carriers seeking review of state commission decisions interpreting or enforcing interconnection agreements may be brought under section 252(e)(6) of the 1996 Act to determine compliance with federal law. If this Court holds in *Mathias* that section 252(e)(6) grants federal court jurisdiction over enforcement actions such as this, the question presented here will be moot.

Regardless of whether section 252(e)(6) is interpreted as an independent grant of jurisdiction, however, section 1331 unquestionably provides general federal question jurisdiction in these circumstances. While WorldCom fully supports the Fourth Circuit's conclusion that Verizon's substantive federal claims are without merit, those claims were not wholly frivolous or insubstantial at the time they were raised and, therefore, "arise under" federal law. Bedrock principles of federal jurisprudence establish that federal courts have general federal question jurisdiction under section 1331 to address non-frivolous claims that state officials have violated federal law. Here, the Fourth Circuit erred by *first* reaching the ultimate conclusion on the merits (that Verizon's federal claims lacked merit), and *then* working back from that conclusion to determine that the court therefore lacked jurisdiction over Verizon's complaint. That analysis is precisely backward.

Indeed, given the general grant of federal question jurisdiction in section 1331, the fundamental question presented in both this case and *Mathias* is whether anything in section 252 *withdraws* federal question jurisdiction as to this one category of federal claims. The answer to that question is clear. Nothing in section 252(e)(6) – or any other provision of the 1996 Act – suggests a congressional intent to *bar* federal jurisdiction over claims that state commission enforcement determinations violate the Act. General federal question jurisdiction under section 1331 therefore exists in this case, as it did in *Mathias*.

ARGUMENT

I. FEDERAL COURTS HAVE GENERAL FEDERAL QUESTION JURISDICTION TO DETERMINE WHETHER STATE COMMISSION "ENFORCEMENT" DETERMINATIONS VIOLATE THE 1996 ACT.

The face of Verizon's complaint establishes that Verizon alleged claims turning on federal law that are not wholly insubstantial or frivolous. The district court therefore had subject matter jurisdiction to consider them, as nothing in the 1996 Act withdraws general federal question jurisdiction over claims that state officials have violated federal law.

A. Verizon Raised Federal Questions That Federal Courts Have Jurisdiction to Answer under 28 U.S.C. § 1331.

Regardless of how the Court rules in *Mathias* on the scope of section 252(e)(6), the district court plainly had jurisdiction under section 1331 to consider Verizon's federal claims. A civil action "arises under" federal law for purposes of section 1331 when a "right or immunity created by the Constitution or laws of the United States [is] an element, and an essential one, of the plaintiff's cause of action." *Gully v. First Nat'l Bank*, 299 U.S. 109, 112 (1936); *accord City of Chicago v. International College of Surgeons*, 522 U.S. 156, 163-64 (1997).

To determine the existence of federal question jurisdiction, the court "must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the

Constitution and laws of the United States." *Bell v. Hood*, 327 U.S. 678, 681 (1946). As this Court recently reaffirmed:

> [T]he district court has jurisdiction if "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another."

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998) (quoting *Bell v. Hood*, 327 U.S. at 685).

As with Ameritech's complaint in *Mathias*, Verizon's complaint here easily satisfies these jurisdictional requirements. As noted, Verizon brought two counts in its complaint, both of which directly identify alleged violations of federal law. In each count, Verizon "claims a right to recover under the . . . laws of the United States. *Bell v. Hood*, 327 U.S. at 681. "[T]he right of the petitioners to recover" thus depends upon the construction of the "laws of the United States." *Steel Co.*, 523 U.S. at 89. In Count I, Verizon alleged that "[t]he PSC's decision . . . is inconsistent with federal law[.]" Compl. ¶ 40. In Count II, Verizon again alleged that "[t]he PSC's decision . . . violates federal law[.]" Compl. ¶ 42. In factual and legal allegations relating to both counts, Verizon alleged:

- The 1996 Act mandates specific kinds of reciprocal compensation duties. Compl. ¶¶ 3, 25.
- Federal law permits reciprocal compensation only for local calls. Compl. ¶ 4.
- Under FCC precedent, calls to ISPs cannot be considered local. Compl. ¶¶ 4, 25, 31-32, 35.

- The PSC "failed to apply the FCC's decisions." Compl. ¶ 5.

- The PSC "misread the relevant FCC order." Compl. ¶¶ 6; *see also id.* ¶¶ 37-39.

- Verizon is "entitled to a declaration that the PSC's determinations are unlawful." Compl. ¶ 7.

Each count thus required the courts below to consider federal law as an "essential element" of Ameritech's claims. Jurisdiction therefore exists under section 1331. As this Court explained when addressing the scope of section 1331, "[i]t is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96 n.14 (1983) (citing *Ex parte Young*, 209 U.S. 123, 160-62 (1908)).

Of course, federal claims challenging state commission determinations as contrary to federal law need not be *meritorious* in order to fall within the jurisdiction of the federal courts. It is "well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." *Bell v. Hood*, 327 U.S. at 682; *accord Jackson Transit Auth. v. Local Div. 1285*, 457 U.S. 15, 21 n.6 (1982). The "absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional *power* to adjudicate the case." *Steel Co.*, 523 U.S. at 89 (emphasis in original). "Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of

merit as not to involve a federal controversy." *Id.* (internal quotations and citations omitted).

The Fourth Circuit nevertheless failed to heed this critical distinction. Without actually holding as much, the Fourth Circuit determined that under the current state of the law, Verizon's federal claims – that state officials had violated federal law in orders requiring reciprocal compensation for calls to ISPs – ultimately had no merit. *See* Pet. App. 23a-29a, 47a-50a. To be sure, WorldCom agrees with the Fourth Circuit that Verizon's federal claims lacked merit. *See, e.g., Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Oklahoma, Inc.*, 235 F.3d 493 (10th Cir. 2000); *Southwestern Bell Tel. Co. v. Public Util. Comm'n of Texas*, 208 F.3d 475 (5th Cir. 2000); *US West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112 (9th Cir. 1999), *cert. denied*, 530 U.S. 1284 (2000). That, however, is irrelevant to the jurisdictional analysis. The fact remains that Verizon raised non-frivolous claims requiring the court to construe and apply federal law. Accordingly, these cases properly fell within the court's subject matter jurisdiction, as this Court's precedent confirms. *Bell v. Hood*, 327 U.S. at 682; *accord Jackson Transit*, 457 U.S. at 21 n.6.

The Fourth Circuit relied on this Court's decision in *Jackson Transit* to defend its holding, describing this case and *Jackson Transit* as "closely analogous." Pet. App. 49a. In *Jackson Transit*, a labor union argued, similar to Verizon's arguments below, that collective bargaining agreements were governed by federal law because a federal statute required local governments to execute those agreements. 457 U.S. at 20-21. This Court disagreed, holding that the interpretation of contractual terms raises a question of federal law only if the statute at issue demonstrates that Congress intended that "the

rights and duties contained in [such] contracts be federal in nature." *Id.* at 23.

This case *is* closely analogous to *Jackson Transit*. In both cases, parties incorrectly argued that federal law governed the interpretation of contracts merely because federal law required the parties to enter into the contracts. Pet. App. 49a. Responding to Verizon's argument that interconnection agreements must be interpreted under federal law because the Act requires their formation, the Fourth Circuit correctly held that "[i]t is a question of State law, however, whether the interconnection agreement at issue in this case includes a dynamic incorporation of statutory interpretation." Pet. App. 27a. Citing *Jackson Transit*, 457 U.S. at 29, the Fourth Circuit also correctly concluded that merely because Congress required parties to enter into a contract does not render interpretation of that contract a federal question. Pet. App. 49a. As the Fourth Circuit noted, the Act permits parties to negotiate and voluntarily agree upon interconnection terms, as occurred here. Pet. App. 27a, 40a. And nothing in the Act suggests that Congress intended to transform every question regarding the meaning of an interconnection agreement into a federal question. To the contrary, Congress expressly preserved state law that is consistent with the Act. It declared that "this Act . . . shall not be construed to modify, impair, or supersede Federal, State or local law unless expressly so provided in such Act or amendments." Pub. L. No. 104-104, § 601(c)(1), *reprinted at* 47 U.S.C. § 152 note. The Act additionally provides that states may impose state law requirements in interconnection agreements and that pro-competitive state law requirements that do not conflict with the Act are not preempted. 47 U.S.C. §§ 251(d)(3); 252(e)(3); 261(c).

But contrary to the Fourth Circuit's conclusion on jurisdiction, *Jackson Transit* actually demonstrates why the district court *did* have jurisdiction here. Even though the Court in *Jackson Transit* rejected the union's claim that federal law governed interpretation of the contracts – much as Verizon's similar claims here are without merit – the Court affirmed the Sixth Circuit's conclusion that the federal courts had jurisdiction over the union's complaint. As the Court explained:

> Thus, we agree with the Court of Appeals that, strictly speaking, the District Court had jurisdiction under 28 U.S.C. § 1331 to hear the union's suit. Under *Bell v. Hood*, 327 U.S. 678, 681 (1946), jurisdiction exists if the complaint is "drawn so as to claim a right to recover under the Constitution and laws of the United States." The complaint alleged a violation . . . of the subsequent collective-bargaining agreement contemplated by the Act, and prayed for relief under federal law. We do not consider the union's asserted federal claim to be "wholly insubstantial and frivolous," 327 U.S. at 682-83, so that the District Court lacked jurisdiction to entertain the union's suit. Thus, the District Court had jurisdiction for the purposes of determining whether the union stated a cause of action on which relief could be granted. *Id.* at 682.

457 U.S. at 21 n.6 (parallel citations omitted).

The identical reasoning applies here. Absent a demonstration that Verizon's claims are "wholly insubstantial and frivolous," the district court and the court of appeals had jurisdiction under section 1331 to consider them. *Id.* The

Fourth Circuit never engaged in that simple threshold analysis. Instead, it concluded that Congress intended for section 252(e)(6) somehow to withdraw the general federal question jurisdiction granted under section 1331. As we show next, the Fourth Circuit was wrong.[12/]

B. Section 252(e)(6) Does Not Withdraw the District Court's General Federal Question Jurisdiction.

Section 252(e)(6) does not preclude a federal court from exercising general federal question jurisdiction in cases challenging state commission enforcement actions. First, it is far from clear that section 252(e)(6) even addresses jurisdiction. It states:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of Section 251 and this section [252].

47 U.S.C. § 252(e)(6). The section does not mention "jurisdiction," and its language is just as consistent with the conclusion that Congress was simply confirming the existence of a cause of action to challenge state commission actions under the Act. *See Steel Co.*, 523 U.S. at 90-91 (even statutes

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[12] The question whether a state commission has interpreted the parties' interconnection agreement contrary to its terms arises under state law. Whether a federal court could exercise supplemental jurisdiction under 28 U.S.C. § 1367 to consider that state law question depends on whether the state commission has asserted Eleventh Amendment immunity. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106, 121-23 (1984).

referring to "jurisdiction" frequently do not relate to "genuine subject-matter jurisdiction").

Second, even assuming that section 252(e)(6) does relate to the district court's subject matter jurisdiction, it cannot be construed as withdrawing preexisting jurisdiction in enforcement cases. Similar to the arguments the petitioners raise in *Mathias*, the crux of the Fourth Circuit's decision is that section 252(e)(6) has nothing to do with state commission decisions enforcing interconnection agreements. It concluded that enforcement determinations simply are not among the "determinations" at issue in section 252(e)(6). Pet. App. 36a-40a.

As we explain in our *Mathias* brief, where the point is more directly at issue, we disagree with this interpretation of section 252(e)(6). *See* Br. of WorldCom, *et al.*, No. 00-878, at 22-28. Enforcement determinations by state commissions are made "under" section 252. Even if this were not the case, however, then section 252(e)(6) would at most be silent concerning jurisdiction to review enforcement determinations. Thus, under the Fourth Circuit's own view of the case, section 252 does not contain a detailed (or indeed any) remedial scheme relating to enforcement of agreements that might conceivably displace the federal question jurisdiction of the district courts under section 1331.[13/] *See, e.g., Bowen v.*

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[13] Similarly, if section 252(e)(6) relates to a cause of action rather than to subject matter jurisdiction, either it gives carriers a cause of action for review of state commission enforcement determinations, or it is altogether silent concerning enforcement. In the latter case, the section would not constitute a detailed remedial scheme for enforcement that could displace a private right of action under 42 U.S.C. § 1983 or the inherent equitable authority of the federal courts to issue injunctions to enforce

(continued...)

Michigan Academy of Family Physicians, 476 U.S. 667, 673-76 (1986) (statute that expressly provides for judicial review in one class of cases does not eliminate section 1331 jurisdiction in another class of cases as to which it is silent) (superseded by statute on other grounds, when Congress amended 42 U.S.C. § 1395ff(b) (1988)).[14]

For these reasons, the Sixth Circuit in *GTE North, Inc. v. Strand*, 209 F.3d 909, 918-19 (6th Cir. 2000), *cert. denied*, 531 U.S. 957 (2000), reached a conclusion that was precisely opposite the one the Fourth Circuit reached here. In *Strand*, GTE claimed that the Michigan commission violated federal law under the 1996 Act by requiring it to make interconnection elements available by tariff, distinct from the interconnection agreement process that the Act specifies. GTE claimed that the Act preempted that decision. The Michigan commission argued that the federal court lacked subject matter jurisdiction,

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[13] (...continued)
federal rights. In any event, federal subject matter jurisdiction would exist even if federal law were ultimately construed not to provide a cause of action here. *Steel Co.*, 523 U.S. at 89.

[14] *See also Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 16 (2000) (explaining that *Michigan Academy* held that "statute's total silence" about judicial review in one class of cases "meant that, although review was not available *under § 405(g)*, the silence did not itself foreclose other forms of review, say review in a court action brought under § 1331"); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 493-94 (1991) (holding that statute which expressly limits jurisdiction of federal courts with regard to specific type of case will not be construed as impairing section 1331's general grant of federal question jurisdiction with respect to closely related proceedings); *cf. Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 105-06 (1868) (holding that repeal of "an additional grant of jurisdiction" does not "operate as a repeal of jurisdiction heretofore allowed"); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 515 (1868) (holding same).

because the case did not involve a determination "under" section 252, which it asserted was the sole basis to bring claims that state officials had violated the Act. The Sixth Circuit disagreed, finding nothing in the Act supporting the argument that section 252 somehow divests federal courts of general subject matter jurisdiction under section 1331. As the Sixth Circuit explained, a contrary holding would be "antithetical to the principle that the parties injured by a governmental entity's failure to adhere to the law may seek redress in the courts." *Id.* at 919.

Third, the Act itself makes clear that it cannot be construed to limit the general reach of section 1331 by implication. Section 601 provides that "[t]his Act and the amendments made by the Act shall not be construed to modify, impair, or supersede Federal . . . law unless *expressly* so provided in such Act or amendments." Pub. L. No. 104-104, § 601(c)(1) (emphasis added), *reprinted at* 47 U.S.C. § 152 note. Congress knows how *expressly* to limit the reach of section 1331, having done so elsewhere in the United States Code. *See, e.g.*, 42 U.S.C. § 405(h) ("[n]o action . . . shall be brought under section 1331 . . . of Title 28 to recover on any claim arising under this subchapter"). Plainly, section 252(e)(6) does not expressly limit the preexisting jurisdiction of the federal courts under section 1331.

Relying on section 601(c)'s preservation of *state* law, the Fourth Circuit concluded that Congress intended to leave review of enforcement decisions to state courts and preclude federal jurisdiction. Pet. App. 35a-40a, 47a. But the Fourth Circuit's analysis inexplicably ignores the express terms of section 601(c), which preserves both *federal and state* law, unless expressly superseded by the Act. With respect to enforcement cases, the Act expressly supersedes neither federal

court jurisdiction under section 1331 nor state court jurisdiction under applicable state law. Accordingly, section 601(c) preserves independent jurisdictional bases under federal law (such as section 1331) as well as state law. The Fourth Circuit's inexplicable reading of section 601(c) to preserve only *state* law jurisdiction contradicts the plain language of that section.

Fourth, where Congress intended the Act to limit a court's subject matter jurisdiction, it did so clearly and unambiguously. Thus, the Act expressly provides that "[n]o *State* court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." 47 U.S.C. § 252(e)(4) (emphasis added). Given that example of an express exclusion of jurisdiction elsewhere in the same section of the Act, the only fair conclusion is that in *enforcement* cases Congress was content to allow litigants the choice between state and federal court for pursuit of their federal claims.

Finally, citing the *Rooker-Feldman* doctrine, the Fourth Circuit intimated that it would violate "basic tenets of federalism" for a federal court to review a state commission's decision absent a specific grant of jurisdiction.[15] Pet. App. 50a. At the outset, that is simply wrong. This Court's recent precedent confirms that section 1331 empowers federal courts to review state agency decisions alleged to violate federal law. *See City of Chicago*, 522 U.S. at 163-64.

The *Rooker-Feldman* doctrine is inapposite for additional reasons. Under that doctrine, which represents the Court's interpretation of its jurisdictional grant in 28 U.S.C. § 1257,

[15] Whether the *Rooker-Feldman* doctrine applies is beyond the limited question on which the Court granted certiorari here.

lower federal courts lack jurisdiction to hear appeals from decisions of a state's highest court or to decide issues "inextricably intertwined" with the judgment of a state's highest court. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483 n.16 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).[16] This Court has never applied the *Rooker-Feldman* doctrine to decisions of state agencies that were not first reviewed by a state's highest court. To do so would foreclose resort to federal district court under section 1983 for virtually all alleged violations of federal law committed by state administrative agencies. This Court has consistently rejected imposition of such exhaustion requirements under section 1983. *See Edwards v. Balisok*, 520 U.S. 641, 649 (1997) (citing *Heck v. Humphrey*, 512 U.S. 477 481, 483 (1994)).[17]

CONCLUSION

For the reasons set forth above, the Court should reverse the Fourth Circuit's decision that the district court lacked general federal question jurisdiction under 28 U.S.C. § 1331.

[16] 28 U.S.C. § 1257 gives this Court jurisdiction to hear certain appeals from the highest court of a state. *See* 28 U.S.C. § 1257. The modern *Rooker-Feldman* doctrine is derived from the negative implication of that statute that the jurisdiction given to this Court is exclusive and does not extend to the lower federal courts.

[17] The *Rooker-Feldman* doctrine is inapplicable for the additional reason that section 252(e)(6) provides for a federal court action to review enforcement determinations. Where Congress specifically provides for a federal court action, the specific statutory grant overrides the more general negative implication of 28 U.S.C. § 1257 on which the *Rooker-Feldman* doctrine is based. *See generally, Morales v. TransWorld Airlines, Inc.*, 504 U.S. 374, 384-85 (1992).

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VERIZON MARYLAND INC., PETITIONER

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a federal district court has subject-matter jurisdiction under 28 U.S.C. 1331 to determine whether a state public utility commission's order interpreting or enforcing an interconnection agreement violates the Telecommunications Act of 1996.

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In the Supreme Court of the United States

No. 00-1531

VERIZON MARYLAND INC., PETITIONER

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.

No. 00-1711

UNITED STATES OF AMERICA, PETITIONER

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (reproduced in the Appendix to Verizon Maryland's petition for a writ of certiorari in No. 00-1531, [hereinafter Verizon Pet. App.] at 1a-72a) is reported at 240 F.3d 279. The opinion of the district court (Verizon Pet. App. 73a-90a) is unreported. The order of the Maryland Public Service Commission (Verizon Pet. App. 91a-111a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 2001. Verizon Maryland filed a petition

for a writ of certiorari on April 5, 2001, and the United States filed a petition for a writ of certiorari on May 15, 2001. Both petitions were granted on June 25, 2001, limited to the second question presented in each petition. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution, the relevant portions of the Telecommunications Act of 1996, the Federal Communications Commission's implementing regulations, and 28 U.S.C. 1331 are set forth at Verizon Pet. App. 112a-134a. Citations of the Act are of the 1999 Supplement to the United States Code.

STATEMENT

The Telecommunications Act of 1996 (1996 Act or Act), Pub. L. No. 104-104, 110 Stat. 56, effected a comprehensive overhaul of telecommunications regulation designed to "open[] all telecommunications markets to competition." H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 113 (1996); see generally *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999). The 1996 Act establishes procedures to encourage competition in local telecommunications markets, including the requirement that incumbent carriers enter into agreements with competitors concerning interconnection with, and access to elements of, the incumbent's network. The Act authorizes state public utility commissions to assume certain regulatory authority respecting those agreements (commonly referred to as interconnection agreements). This case concerns whether the federal district courts have subject matter jurisdiction under 28 U.S.C. 1331 to review state commission decisions

construing and enforcing interconnection agreements for compliance with federal law.

1. For many years, most telephone service in the United States was provided by AT&T and its local-exchange affiliates, collectively known as the Bell System. In 1974, the United States sued AT&T under the Sherman Act, 15 U.S.C. 1 *et seq.*, alleging, among other things, that the Bell System had improperly used its monopoly power in local markets to impede competition in the long-distance market. See *United States* v. *AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982), aff'd, 460 U.S. 1001 (1983). In 1982, AT&T entered into a consent decree in settlement of that suit that required AT&T to divest its local exchange operations. The newly independent Bell Operating Companies, together with approximately 1,500 non-Bell carriers, continued to provide monopoly local exchange service in their respective service areas. What remained of AT&T continued to provide nationwide long-distance service, increasingly in competition with other long-distance carriers, such as MCI and Sprint. See H.R. Rep. No. 204, 104th Cong., 1st Sess. Pt. 1, at 48-50 (1995).

a. In considering how to facilitate the entry of competitors into local telephone markets, Congress recognized that the economic barriers to entry into those markets would remain formidable even if the regulatory restrictions on competition were removed. H.R. Conf. Rep. No. 458, *supra*, at 113. It would be economically impracticable, at least with the current technology, for even the largest prospective competitor to duplicate an incumbent carrier's entire local network —*i.e.*, to create a new network of switches and a new infrastructure of loops connecting every house and business in a calling area to those switches and thus to one another. Moreover, without rights of access to the

existing network, a prospective competitor could not gradually enter the market through partial duplication of local exchange facilities; the competitor would win few customers if, for example, those customers could call only one another and not customers of the incumbent's separate (and already established) network.

Congress addressed those concerns in Sections 251 and 252 of the 1996 Act. It imposed various obligations on all local exchange carriers, incumbents and new entrants alike, including the obligations to provide number portability (so that a consumer may change carriers without changing telephone numbers), to allow competitors to have access to certain services (*e.g.*, directory assistance) and facilities (*e.g.*, poles, ducts, conduits, and rights-of-way), and "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. 251(b)(5). The underlying dispute in this case concerns an arrangement to pay reciprocal compensation, which is a payment made by the carrier whose customer originates a call to the carrier whose facilities are used to complete the call.

Congress also imposed on incumbent carriers the obligation to open their networks to new entrants in three distinct but complementary ways. First, new entrants are entitled to "interconnect" their networks with the incumbent's existing network, and to do so at rates and on terms and conditions that are "just, reasonable, and nondiscriminatory." 47 U.S.C. 251(c)(2). Second, new entrants are entitled to gain access to elements of an incumbent's network "on an unbundled basis"—*i.e.*, to lease individual network elements (loops, switching capability, etc.) at rates and on terms and conditions that are "just, reasonable, and nondiscriminatory." 47 U.S.C. 251(c)(3). Third, new entrants

are entitled to buy an incumbent's retail services "at wholesale rates" and to resell those services to end users. 47 U.S.C. 251(c)(4).[1]

The 1996 Act requires incumbents to negotiate in good faith with new entrants on agreements regarding reciprocal compensation, interconnection, access to network elements, resale of services, and the other arrangements contemplated by the Act. 47 U.S.C. 251(c), 252. The Act provides for binding arbitration if the parties cannot conclude an interconnection agreement through negotiation. 47 U.S.C. 252(b).

The 1996 Act permits, but does not require, state public utility commissions to assume regulatory authority over interconnection agreements, set the terms and conditions for those agreements (subject to the standards set forth in the Act and in regulations promulgated by the Federal Communications Commission (FCC) pursuant to the Act), arbitrate disputes that arise in the negotiation of the agreements, and exercise review and enforcement authority. If a state commission elects not to assume such authority, the FCC will perform that role. 47 U.S.C. 252(e)(5).

b. All interconnection agreements, whether arrived at through negotiation or arbitration, are subject to approval by the state commission or, if it declines that role, the FCC. 47 U.S.C. 252(e)(1) and (5). A negotiated agreement may be approved by the state commission (or the FCC) only if it does not "discriminate[] against a telecommunications carrier not a party to the

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[1] The Court is currently considering a challenge to the methodology developed by the Federal Communications Commission (FCC) for establishing the rates that incumbents may charge new entrants for interconnection and access to network elements. See *Verizon Communications, Inc.* v. *FCC*, Nos. 00-511 et al. (to be argued Oct. 10, 2001).

agreement" and is "consistent with the public interest, convenience, and necessity." 47 U.S.C. 252(e)(2)(A).

If the parties are unable to conclude an agreement through negotiations and proceed to arbitration, the state commission (or, if it declines that role, the FCC) will resolve any open issue. Such issues may concern the rates, terms, and conditions under which competitors will interconnect with or lease network elements from incumbents, as well as the charges that the incumbent and the new entrant will pay each other for transport and termination of calls. The 1996 Act sets forth standards for state commissions to follow in setting such rates; the state commissions are also required to follow FCC regulations issued pursuant to Section 251(d)(1). 47 U.S.C. 252(c). Once an agreement has been concluded through arbitration, the parties must submit it to the state commission (or, if it declines that role, the FCC) for approval. An arbitrated agreement may be approved only if it complies with Sections 251 and 252 of the Act and applicable FCC regulations. 47 U.S.C. 252(e)(1) and (2)(B).

The 1996 Act provides for federal court "[r]eview of State commission actions" with respect to interconnection agreements. 47 U.S.C. 252(e)(6) (title). The Act states, in relevant part:

> In any case in which a State commission makes a determination under this section [*i.e.*, Section 252], any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

47 U.S.C. 252(e)(6). The Act divests state courts of "jurisdiction to review the action of a State commission

in approving or rejecting an agreement under this section." 47 U.S.C. 252(e)(4).

Where a state commission has elected not to assume regulatory authority under the 1996 Act and the FCC has acted in its place, the Act provides that the FCC proceeding and "any judicial review of the [FCC's] actions shall be the exclusive remedies for a State commission's failure to act." 47 U.S.C. 252(e)(6). The FCC's final orders with respect to interconnection agreements are reviewable, as are other final orders of the FCC, in the federal courts of appeals pursuant to the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.*

2. The Maryland Public Service Commission (MPSC) has elected to exercise regulatory authority under the 1996 Act. The MPSC approved interconnection agreements, which were arrived at through negotiations, between Bell Atlantic, the incumbent provider of local telecommunications service in Maryland (and a predecessor to Verizon Communications, Inc.), and prospective entrants into the local telecommunications market, including MCI WorldCom. As required under the Act and the FCC's implementing regulations, those agreements provided for the payment of reciprocal compensation for "local" calls. See 47 U.S.C. 251(b)(5); 47 C.F.R. 51.701(a) (2000).

A dispute subsequently arose among the parties as to whether Bell Atlantic had an obligation under the agreements to pay reciprocal compensation for its customers' calls to Internet service providers (ISPs) to gain access to the Internet. The MPSC exercised regulatory authority over the dispute. It issued a determination that such calls are "local" and ordered the payment of reciprocal compensation.

3. Bell Atlantic sought review of the MPSC's decision in the United States District Court of the District of Maryland, asserting that the MPSC's decision was contrary to federal law, as reflected in a recent ruling of the FCC under the 1996 Act (see pp. 18-19, *infra*), and invoking the court's jurisdiction under 47 U.S.C. 252(e)(6) and 28 U.S.C. 1331. Bell Atlantic named as defendants the MPSC, the individual MPSC commissioners in their official capacities, and the competing carriers that are parties to the agreements.

The MPSC and its commissioners moved to dismiss. They argued that federal district courts lack subject-matter jurisdiction to review decisions of state public utility commissions interpreting and enforcing a previously approved interconnection agreement. They also argued that state commissions and their commissioners are immune from such suits under the Eleventh Amendment. The United States intervened to defend the constitutionality of the judicial review provisions of the 1996 Act.

The district court dismissed the suit. The court concluded that the Eleventh Amendment barred suit against the MPSC and its individual members. Verizon Pet. App. 77a-84a. The court rejected the argument that the MPSC had waived its sovereign immunity by voluntarily electing to exercise regulatory authority under the 1996 Act. *Id.* at 77a-79a. The court also rejected the argument that the suit could proceed against the individual commissioners under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), which permits suits against state officers in their official capacities to enjoin ongoing violations of federal law. Verizon Pet. App. 79a-83a. The court then concluded that the MPSC was an indispensable party to the action under Rule 19 of the Federal Rules of Civil Procedure, and thus that

the action had to be dismissed against the other defendants as well. *Id.* at 84a-86a.

4. A divided panel of the United States Court of Appeals for the Fourth Circuit affirmed. The court held that state public utility commissions and their commissioners are immune from suit in federal court under the Eleventh Amendment. The court also held that the district courts lack subject-matter jurisdiction to review state commission decisions enforcing or interpreting previously approved interconnection agreements. Verizon Pet. App. 1a-51a.

First, the court held that the MPSC had not waived its sovereign immunity by electing to exercise regulatory authority over interconnection agreements entered into pursuant to the 1996 Act. Verizon Pet. App. 14a-21a. The court accepted that "a State commission that elects to make § 252 determinations must, of necessity, also be electing to have its determinations reviewed by a federal court under § 252(e)(6)." *Id.* at 14a-15a. But the court declined to "infer from this consent to federal-court review a consent by a State commission itself *to be made a party* to that federal review." *Id.* at 15a. The court noted that no provision of the Act expressly states that a state commission, by electing to regulate under the 1996 Act, "thereby agrees to be named as a party in federal court or * * * waives its Eleventh Amendment immunity." *Ibid.* The court concluded that, absent such an "unmistakably clear and unequivocal" expression of Congress's intent "to condition State utility commissions' participation in the regulation of interconnection agreements on a waiver of sovereign immunity from private suit," no such waiver could properly be inferred. *Id.* at 18a-19a.

Second, the court held that the individual commissioners could not be made parties to the action

under *Ex parte Young*. Verizon Pet. App. 21a-30a. The court focused its analysis on "the federal interests served by permitting [such] a federal suit." *Id.* at 24a. The court reasoned that "[t]he federal interest furthered by the 1996 Act is to have § 252 determinations made by State commissions reviewed in federal court," and not "to discipline individual State officials or to expose them to any liability." *Ibid.* The court concluded that "this interest would not be frustrated if we were to preserve the Eleventh Amendment immunity of State officials with respect to such suits." *Id.* at 24a-25a.

In addition, the court expressed doubt that "Bell Atlantic's action is designed to prevent an ongoing violation of federal law," noting that federal law does not clearly prohibit the treatment of ISP-bound calls as "local" traffic. Verizon Pet. App. 25a-27a. The court suggested that, "in any suit against State commissioners, it is more likely that State contract-law, rather than federal-law, violations would be redressed." *Id.* at 29a.

The court also suggested that allowing *Ex parte Young* actions to challenge the decisions of state commissions "would improperly expand the federal remedy selected by Congress." Verizon Pet. App. 29a. The court construed the 1996 Act as reflecting Congress's determination to limit federal court review to only those decisions of state commissions that involve the initial approval or rejection of interconnection agreements. *Id.* at 28a-29a.

Third, the court held that federal district courts do not have jurisdiction under Section 252(e)(6) to review state commission decisions enforcing previously approved interconnection agreements, as distinguished from decisions approving or rejecting interconnection

agreements in the first instance. Verizon Pet. App. 30a-47a. The court noted that Section 252(e)(6) provides, by its terms, for review of state commission "determination[s] under this section [*i.e.*, Section 252]" to ascertain whether those determinations "meet[] the requirements of section 251 and this section [*i.e.*, Section 252]." *Id.* at 38a-39a. The court reasoned that "in the final analysis, the State commission determinations under § 252 involve only approval or rejection of such agreements." *Id.* at 39a. The court concluded that other state commission determinations, including those enforcing interconnection agreements, are "left for review as specified by State law." *Ibid.*

Here, the court noted that the MPSC had approved the interconnection agreements between Bell Atlantic and MCI WorldCom and that "no party challenged that approval" in the district court. Verizon Pet. App. 40a. The court concluded that the MPSC's subsequent decision construing and enforcing that agreement "was not a § 252 determination and therefore was not reviewable in federal court by virtue of § 252(e)(6)." *Id.* at 43a.

Finally, the court held that 28 U.S.C. 1331 likewise does not provide a basis for federal court jurisdiction to review state commission decisions enforcing interconnection agreements. Verizon Pet. App. 47a-50a. The court construed Section 252(e)(6) as reflecting a congressional intent to confine federal court review to state commission decisions approving or rejecting interconnection agreements. "[I]n light of the limited grant of federal jurisdiction in 47 U.S.C. § 252(e)(6)," the court observed, "the exercise of § 1331 general federal-question jurisdiction would 'flout, or at least undermine, congressional intent.'" *Id.* at 48a (quoting *Merrell Dow Pharm. Inc.* v. *Thompson*, 478 U.S. 804 (1986)).

5. Judge King dissented from the court's holdings on both the jurisdictional issue and the Eleventh Amendment issue, which he noted were in conflict with holdings of the Fifth, Sixth, Seventh, Eighth, and Tenth Circuits. Verizon Pet. App. 52a-53a (citing cases). On the jurisdictional issue, Judge King concluded that federal district courts have jurisdiction under Section 252(e)(6) to review state commission decisions enforcing previously approved interconnection agreements. Verizon Pet. App. 54a-58a. He reasoned that "the power granted to states under § 252 to approve or reject interconnection agreements * * * necessarily includes the power to enforce the interconnection agreement." *Id.* at 55a (citation and internal quotation marks omitted). He therefore concluded that state commission decisions enforcing interconnection agreements are "determinations under [Section 252]" within the meaning of the grant of federal court jurisdiction in Section 252(e)(6). *Id.* at 57a. He did not reach the question whether federal courts also, or alternatively, have jurisdiction under 28 U.S.C. 1331 to review such state commission decisions.

On the Eleventh Amendment issue, Judge King concluded that the MPSC waived its sovereign immunity by electing to exercise regulatory authority under the 1996 Act. Verizon Pet. App. 59a-67a. He disagreed with the court's determination that Congress had not invited the States to waive their sovereign immunity with sufficient clarity. He viewed the judicial review provisions of the Act as "clearly show[ing] Congress's intent to subject participating states to suits in federal court." *Id.* at 60a-61a.

In the alternative, Judge King concluded that the individual MPSC commissioners are amenable to suit under *Ex parte Young*. Verizon Pet. App. 67a-71a. He

reasoned that the 1996 Act does not impose an elaborate remedial scheme that would be improperly "expand[ed]" by allowing such review, *id.* at 69a-70a, and that Maryland has no "special sovereignty interest" in the regulation of those aspects of local telecommunications that now are governed by the Act, *id.* at 71a.

SUMMARY OF ARGUMENT

The federal district courts have subject-matter jurisdiction over suits that challenge, as contrary to federal law, orders of state public utility commissions interpreting or enforcing interconnection agreements. That jurisdiction derives from either, or both, of two sources: 47 U.S.C. 252(e)(6), the judicial review provision of the 1996 Act, and 28 U.S.C. 1331, the general federal-question jurisdiction statute. The Court is considering in *Mathias* v. *WorldCom Technologies, Inc.*, No. 00-878, whether Section 252(e)(6) confers jurisdiction on the district courts to review such orders. This case concerns whether jurisdiction also, or alternatively, exists under Section 1331.

Section 1331 provides, in pertinent part, that "[t]he district courts shall have original jurisdiction of all civil actions arising under the * * * laws * * * of the United States." Section 1331 thus encompasses suits that seek "injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983). This is such a suit. Bell Atlantic contends that the MPSC has construed its interconnection agreements in a manner that conflicts with, and thus is preempted by, federal law, specifically

a declaratory ruling issued by the FCC pursuant to the 1996 Act.

The court of appeals, while not disputing that Bell Atlantic's suit is one "arising under the * * * laws * * * of the United States," nonetheless held that the suit was not within the district court's jurisdiction under Section 1331. The court of appeals construed Section 252(e)(6), which provides the district courts with jurisdiction to review a state commission's "determination under [Section 252]" of the 1996 Act, as applying only to a determination approving or rejecting a new interconnection agreement, and not to a determination interpreting or enforcing an existing agreement. The court of appeals then concluded that it would "undermine" congressional intent to allow state commission determinations that are not (in the court's view) reviewable in district court under Section 252(e)(6) nonetheless to be reviewable under Section 1331.

The court of appeals' reasoning is not supported by the text of Section 252(e)(6) or by the congressional purpose underlying the local competition provisions of the 1996 Act. Section 252(e)(6) simply provides that the district courts possess jurisdiction with respect to certain categories of cases arising under the Act. It does not purport to curtail the district courts' existing jurisdiction under Section 1331 with respect to cases arising under federal law generally. Moreover, in a companion provision of the Act, Congress expressly provided that "[n]o State court shall have jurisdiction to review the action of a State commission" in certain contexts, 47 U.S.C. 252(e)(4). Presumably, if Congress intended similarly to restrict the jurisdiction of the federal courts, Congress would have used similarly preclusive language.

Congress enacted the 1996 Act with the purpose of establishing a federal regulatory regime with respect to local telecommunications competition. Congress permitted state commissions, if they chose, to play a role in that regime, but only in accordance with the new federal standards and procedures. Congress wanted the federal district courts to be available to assure that state commissions properly apply those federal standards; indeed, Congress made the federal courts the exclusive forum to review state commissions' orders approving or rejecting interconnection agreements under the Act. It does not stand to reason that Congress at the same time intended to divest the district courts of jurisdiction over suits contending that other actions of state commissions with respect to interconnection agreements violate controlling federal law.

ARGUMENT

FEDERAL DISTRICT COURTS HAVE JURISDICTION UNDER 28 U.S.C. 1331 TO ADJUDICATE SUITS "ARISING UNDER THE * * * LAWS * * * OF THE UNITED STATES" TO CHALLENGE STATE COMMISSION ORDERS INTERPRETING OR ENFORCING INTERCONNECTION AGREEMENTS

1. This Court granted certiorari in *Mathias* v. *WorldCom Technologies, Inc.*, No. 00-878, to consider, among other things, whether 47 U.S.C. 252(e)(6), the judicial review provision of the 1996 Act, grants the district courts jurisdiction to review state commission orders interpreting or enforcing existing interconnection agreements for compliance with the Act. Section

252(e)(6), titled "Review of State commission actions," states, in pertinent part:

> In any case in which a State commission makes a determination under this section [*i.e.*, Section 252], any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

47 U.S.C. 252(e)(6).

Section 252 expressly provides that, when an interconnection agreement is concluded through either negotiation or arbitration, the agreement must be submitted to the state commissions for its approval or rejection. See 47 U.S.C. 252(a) and (b). It is therefore undisputed that a state commission "makes a determination under [Section 252]" when it approves or rejects an interconnection agreement in the first instance. Those are not, however, the *only* state commission decisions that are reviewable under Section 252(e)(6), as every court of appeals that has addressed the question, with the exception of the Fourth Circuit here, has recognized.[2] A state commission's authority under Section 252 to approve an interconnection agreement necessarily encompasses the authority to interpret and enforce the agreement as disputes subsequently arise in its implementation. Accordingly, a

[2] See *Southwestern Bell Tel. Co.* v. *Brooks Fiber Communications of Okla., Inc.*, 235 F.3d 493, 496-497 (10th Cir. 2000); *Southwestern Bell Tel. Co.* v. *Connect Communications Corp.*, 225 F.3d 942, 946 (8th Cir. 2000); *MCI Telecomms. Corp.* v. *Illinois Bell Tel. Co.*, 222 F.3d 323, 338 (7th Cir. 2000), cert. denied, 121 S. Ct. 896 (2001); *Southwestern Bell Tel. Co.* v. *Public Util. Comm'n*, 208 F.3d 475, 479-480 (5th Cir. 2000).

state commission's order interpreting or enforcing an existing agreement is a "determination under [Section 252]" that is reviewable in federal district court under Section 252(e)(6). See U.S. Br. 16-29, *Mathias*.

The question on which the Court granted certiorari in this case concerns an alternative basis of federal jurisdiction to review orders interpreting or enforcing interconnection agreements—namely, 28 U.S.C. 1331, the general federal-question jurisdiction statute. The Court need not resolve that question if, in *Mathias*, the Court holds that Section 252(e)(6) encompasses such orders. In any event, whether or not Section 252(e)(6) affirmatively vests the district courts with jurisdiction to review state commission orders interpreting or enforcing interconnection agreements, that provision certainly does not *divest* the district courts of the jurisdiction that they ordinarily possess under Section 1331 with respect to claims arising under federal law. Accordingly, the district court has jurisdiction under Section 1331 to adjudicate Bell Atlantic's claim that the MPSC construed and enforced its interconnection agreements in a manner that is contrary to, and thus is preempted by, controlling federal law.

2. Section 1331 states that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. 1331. This Court has recognized that Section 1331 provides the district courts with jurisdiction over suits to enjoin state regulatory action on the ground that such action is contrary to federal law:

> A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of

> the Supremacy Clause of the Constitution, must prevail, * * * presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.

Shaw v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) (citing cases); see also, *e.g.*, *Lawrence County* v. *Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 259 n.6 (1985) (noting that a suit seeking "a declaratory judgment that [a] state statute conflicted with [a] federal Act and was therefore invalid under the Supremacy Clause" was "one arising under federal law for purposes of federal jurisdiction under 28 U.S.C. § 1331").

This is such a case. The gravamen of Bell Atlantic's complaint in the district court is that the MPSC issued an order that "is in direct conflict with a declaratory ruling issued February 26, 1999 by the Federal Communications Commission" pursuant to the 1996 Act. Verizon Pet. App. 73a-74a; see also *id.* at 75a-76a (describing allegations of complaint). The interconnection agreements between Bell Atlantic and competing carriers provide for the payment of reciprocal compensation "for the transport and termination of Local Traffic." *Id.* at 109a. The agreements do not specify whether the term "Local Traffic" includes calls to ISPs to gain access to the Internet. After the agreements took effect, the FCC issued a declaratory ruling that, among other things, characterized ISP calls as "largely interstate," and thus as outside the scope of any obligation to pay reciprocal compensation imposed by the 1996 Act and its implementing regulations. See *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (Declaratory Ruling), 14 F.C.C.R. 3689, 3690 (1999), vacated and remanded, *Bell Atlantic Tel. Cos.* v. *FCC*, 206 F.3d 1 (D.C. Cir. 2000). The MPSC nonetheless continued to construe the agreements at issue here, with their provision for the payment of reciprocal compensation for "Local Traffic," as requiring reciprocal compensation for ISP calls.[3]

Bell Atlantic's suit thus turns on the resolution of a federal question: whether the FCC's Declaratory Ruling (or the considerations underlying that Ruling) precludes state commissions from construing existing interconnection agreements to require the payment of reciprocal compensation for ISP calls. The task of resolving that question on the merits has been complicated by the decision of the District of Columbia Circuit vacating the Declaratory Ruling and the

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[3] Although the 1996 Act imposes a general duty to "establish reciprocal compensation arrangements for the transport and termination of telecommunications," 47 U.S.C. 251(b)(5), the FCC's implementing regulations at that time limited the requirement to "local telecommunications traffic," 47 C.F.R. 51.701(a) (2000). See Verizon Pet. App. 26a-27a. In the Declaratory Ruling, the FCC concluded that calls to ISPs are primarily interstate, reasoning that the communication does not terminate with the local ISP, but instead extends to out-of-state websites. See 14 F.C.C.R. at 3690 (para. 1). The FCC also stated, however, that parties may include in their interconnection agreements a provision for the payment of reciprocal compensation for ISP calls and that state commissions may construe existing agreements as requiring such payment. *Id.* at 3703-3705 (paras. 24-25). On review, the D.C. Circuit principally held that the FCC had not adequately justified the use of a so-called "end-to-end" analysis, which the FCC has traditionally used to determine whether a call is within its interstate jurisdiction, to determine whether ISP calls are local or non-local for purposes of 47 U.S.C. 251(b)(5) and 47 C.F.R. 51.701(a). See *Bell Atlantic Tel Cos.* v. *FCC*, 206 F.3d at 4-5. The court vacated the Declaratory Ruling and remanded the matter to the FCC for further proceedings.

pendency of further FCC proceedings on remand. See note 3, *supra*. But that does not affect the jurisdictional question on which this Court has granted review; nor does it detract from the quintessentially federal character of the underlying question sought to be resolved by the invocation of the district court's jurisdiction in this case.

3. The court of appeals, although holding that the federal courts do not have jurisdiction over Bell Atlantic's suit pursuant to Section 1331, did not dispute that the suit is one "arising under the * * * laws * * * of the United States" within the meaning of Section 1331.[4] Instead, the court of appeals perceived the grant of jurisdiction to federal courts in 47 U.S.C. 252(e)(6) as *curtailing* the jurisdiction otherwise available to federal courts under 28 U.S.C. 1331. Verizon Pet. App. 48a. Thus, the court of appeals reasoned, "in light of the limited grant of federal jurisdiction in 47 U.S.C. § 252(e)(6), the exercise of § 1331 general federal-question jurisdiction would 'flout, or at least undermine, congressional intent.'" *Ibid.* (quoting *Merrell Dow Pharm. Inc.* v. *Thompson*, 478 U.S. 804 (1986)). That conclusion is incorrect.

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[4] In holding that this suit could not proceed against the state commissioners under *Ex parte Young*, the court of appeals suggested that a carrier, such as Bell Atlantic here, could not "allege an ongoing violation of federal law when the State commission determines as a matter of State contract law that the parties agreed to treat ISP-bound calls as local for purposes of reciprocal compensation." Verizon Pet. App. 27a-28a. But that suggestion itself depends on the court of appeals' conclusion concerning a question of federal law: that the FCC's Declaratory Ruling "explicitly allows for a result of the kind reached by the State commission in this case." *Id.* at 28a.

a. Nothing in the text of Section 252(e)(6), which makes clear that the federal courts possess jurisdiction with respect to certain cases arising under the 1996 Act, purports to restrict the federal courts' jurisdiction under Section 1331 with respect to other cases. Congress enacted the 1996 Act, including its judicial review provisions, against the backdrop of Section 1331, with its conferral of jurisdiction over "*all* civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. 1331 (emphasis added). Congress must be presumed to understand that, in order to withdraw the federal courts' existing jurisdiction over some category of cases arising under federal law, a statute would have to speak in language of divestment. See *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 494 (1991) (recognizing that the district courts' "general federal-question jurisdiction under 28 U.S.C. § 1331 to hear [an] action remains unimpaired" unless Congress has clearly precluded such jurisdiction). But Congress did not employ such language in Section 252(e)(6).[5]

Moreover, in a companion provision of Section 252, Congress declared, in no uncertain terms, that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." 47 U.S.C. 252(e)(4).

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[5] The MPSC argued to the court of appeals, as the state commissioners argue to this Court in *Mathias*, that Section 252(e)(6) does not confer federal jurisdiction to review orders interpreting or enforcing interconnection agreements, because the 1996 Act does not specifically refer to such orders. At the same time, the MPSC argued that Section 252(e)(6) revokes federal court jurisdiction under Section 1331 with respect to suits challenging such orders as contrary to federal law, even though the Act does not specifically refer to such orders. Both of those propositions cannot be correct; but both may be, and in fact are, incorrect.

Presumably, if Congress intended similarly to deprive the federal courts of jurisdiction over certain categories of cases arising under federal law, Congress would have spoken in similar terms. Instead, however, Congress used entirely different language in Section 252(e)(6), which is consistent with federal court jurisdiction over all cases arising under the 1996 Act, whether jurisdiction is based on Section 252(e)(6) or Section 1331. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Congress knows quite well how to preclude judicial review under Section 1331 if it so desires. For example, in *Your Home Visiting Nurse Services, Inc.* v. *Shalala*, 525 U.S. 449 (1999), this Court confirmed that a provision of the Medicare Act, 42 U.S.C. 405(h), bars suits under Section 1331. That provision states, in relevant part, that "[n]o action against * * * the [Secretary] or any officer or employee thereof shall be brought under section 1331 * * * of title 28 to recover on any claim arising under this subchapter." 525 U.S. at 456. No comparable language in the 1996 Act purports to divest the federal courts of jurisdiction under Section 1331 with respect to suits contending that certain orders of state commissions violate federal law.

b. Nor is there any indication in the purpose or history of the 1996 Act that Congress intended to deprive the district courts of the jurisdiction that they ordinarily possess with respect to cases arising under federal law. Indeed, all indications are to the contrary.

In the 1996 Act, Congress established a new federal regulatory regime to govern local telecommunications

competition; as this Court has observed, "[w]ith regard to the matters addressed by the 1996 Act," Congress "unquestionably" has "taken the regulation of local telecommunications competition away from the States." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 379 n.6 (1999). Congress allowed the States, through their state commissions, to play a role in that new regime, but only in accordance with the new federal standards (and any consistent state standards). Congress wanted the federal courts to be available to assure that state commissions properly apply those federal standards. Thus, Congress made the federal courts the exclusive forum to review state commissions' orders approving or rejecting interconnection agreements under the 1996 Act. It does not stand to reason that Congress at the same time stripped the federal courts of jurisdiction over suits contending that other regulatory actions of state commissions with respect to interconnection agreements are contrary to federal law.

Congress would have understood that important issues of federal law would be implicated by state commissions' decisions interpreting and enforcing interconnection agreements as well as by decisions approving or rejecting such agreements in the first instance. It may often be the case that such issues do not arise until an agreement has been in place for some time. For example, given the rapidity of technological change within the telecommunications industry, disputes may arise during the term of the agreement as to whether, or to what extent, old terminology applies to new circumstances. The underlying dispute in this case concerning the characterization of calls to ISPs is illustrative. Congress could not have intended to deprive the district courts of jurisdiction to consider whether a

state commission has resolved such a dispute in a manner contrary to federal law.

c. The Sixth Circuit has held that certain state commission orders, although not reviewable in district court under Section 252(e)(6), are nonetheless reviewable under Section 1331. *GTE North, Inc.* v. *Strand*, 209 F.3d 909, 919-920, cert. denied, 531 U.S. 957 (2000).[6] In so holding, the Sixth Circuit rejected the jurisdiction-stripping interpretation of Section 252(e)(6) adopted by the Fourth Circuit in this case, concluding that Section 252(e)(6) is not "the exclusive basis" for district court review of "state commission actions that in any way relate to interconnection agreements." *Id.* at 919. The court noted that construing Section 252(e)(6) to preclude the district courts from exercising jurisdiction over federal preemption challenges to state commission orders that are not themselves reviewable under that provision "would have enormous negative implications." *Ibid.* The court suggested, for example, that such a construction of Section 252(e)(6) would enable "state commissions [to] insulate regulatory requirements that violate the [1996 Act] from federal * * * court review," and would undermine "Congress's decision to establish federal procedures for negotiating interconnection rights and to concentrate judicial review of interconnection agreements in the federal courts." *Ibid.*

4. Finally, the court of appeals perceived that "it would violate basic tenets of federalism" to allow

[6] *Strand* did not concern judicial review of a state commission order, such as the one at issue here, that construes and enforces an existing interconnection agreement. Rather, *Strand* concerned judicial review of a state commission order that imposed certain requirements on incumbent carriers independent of any interconnection agreement. See *Strand*, 209 F.3d at 914.

federal court review of the decisions of a state commission "in the absence of specific federal authorization." Verizon Pet. App. 50a (citing *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983)). This Court has recognized, however, that general statutory language is sufficient to confer jurisdiction on the district courts over suits challenging the decisions of a state agency or state official as contrary to federal law. See, *e.g.*, *City of Chicago* v. *International College of Surgeons*, 522 U.S. 156, 169 (1997) ("federal jurisdiction generally encompasses judicial review of state administrative decisions"); *Blatchford* v. *Native Vill. of Noatak*, 501 U.S. 775, 786-787 n.4 (1991).

The assertedly "quasi-judicial" status of the MPSC under state law (Verizon Pet. App. 50a) does not alter the analysis. The *Rooker-Feldman* abstention doctrine, which bars the lower federal courts from entertaining challenges to the decisions of state courts, rests on a rationale that does not extend to the decisions of state commissions. "The *Rooker-Feldman* doctrine interprets 28 U.S.C. § 1257 as ordinarily barring direct review in the lower federal courts of a decision reached by the highest state court, for such authority is vested solely in this Court." *Asarco Inc.* v. *Kadish*, 490 U.S. 605, 622 (1989); see *Rooker*, 263 U.S. at 415-416. Section 1257 does not itself address judicial review of the decisions of state commissions. Nor is there any statutory counterpart to Section 1257 that applies to decisions of state commissions, even those commissions that might arguably be characterized as performing "quasi-judicial" functions.

Finally, any federalism concerns presented by federal court review in the circumstances of this case are significantly attenuated. As noted above, the States

have chosen to participate in the federal regulatory scheme established by the 1996 Act, which requires the application of federal standards set by Congress and the FCC. Even the court of appeals acknowledged that States made that choice on the understanding that many state commission decisions would be reviewable in federal court. Verizon Pet. App. 14a-15a. It is thus neither surprising nor offensive to federalism principles for Congress to have contemplated that, "if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel," *Iowa Utils. Bd.*, 525 U.S. at 379 n.6, either under Section 252(e)(6) or under Section 1331.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded for further proceedings, which may, if appropriate, include further consideration in light of the Court's decision in *Mathias* v. *WorldCom Technologies, Inc.*, No. 00-878.

Respectfully submitted.

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No. 00-1531 & 00-1711

IN THE
SUPREME COURT OF THE UNITED STATES

VERIZON MARYLAND INC.,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.,
Respondents.

UNITED STATES OF AMERICA
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.,
Respondents

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT

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October 26, 2001

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a federal district court has subject matter jurisdiction under 28 U.S.C. §1331 to review State commission actions taken pursuant to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§151 *et seq.*

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No. 00-1531 & 00-1711

IN THE

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VERIZON MARYLAND INC.,
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UNITED STATES OF AMERICA,
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On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

This case involves federal court review of an order entered by the Public Service Commission of Maryland ("Maryland Commission" or "MDPSC"). The Maryland Commission is an agency of the State of Maryland and it supervises and regulates telecommunications carriers in Maryland. As part of its responsibilities, the Maryland Commission administers and enforces the *Public Utility Companies Article ("PUC Article")* of the Maryland Code. Final orders or decisions of the Maryland Commission are subject to judicial review in Maryland circuit courts, *PUC Article*, §3-204. Parties are entitled to further review by the Maryland Court of Special Appeals. *Id.* at §3-209.

This case began at the Maryland Commission when Verizon Maryland, Inc. ("Verizon") filed a request for declaratory ruling asking that the Maryland Commission find that Verizon was not obligated under §251 of the Telecommunications Act of 1996 ("1996 Act") to pay reciprocal compensation for calls delivered to Internet Service Providers ("ISPs") who are served by competitive local exchange carriers ("CLECs"). The Maryland Commission issued a declaratory ruling finding that Verizon must continue to pay reciprocal compensation and Verizon sought review of this order pursuant to §252(e)(6) of the 1996 Act, 47 U.S.C. §251 et. seq. and 28 U.S.C. §1331.

The District Court of Maryland dismissed Verizon's complaint, finding that both the Maryland Commission and the individual commissioners were immune from suit under the Eleventh Amendment (Pet. App. 77a-84a);[1] and also

[1] "Pet. App." refers to the Appendix to Verizon Maryland, Inc.'s Petition No. 00-1531.

finding that the Eleventh Amendment would bar suit brought pursuant to 28 U.S.C. §1331 (Pet. App. 90a). On appeal, the United States Court of Appeals for the Fourth Circuit held that the Maryland Commission did not waive its Eleventh Amendment immunity when it implemented the 1996 Act. (*Id.* at 14a - 21a). The Fourth Circuit further found that the *Ex parte Young*[2] doctrine did not permit an action against the individual commissioners in their official capacity. (*Id.* at 21a - 30). The Court also found that a State commission's action interpreting or enforcing an interconnection agreement under the 1996 Act was not a "determination" under 47 U.S.C. §252(e)(6). (*Id.* at 30a - 47a). Finally, with regard to the issue presented in this case, the Fourth Circuit held that 28 U.S.C. §1331 does not provide a federal district court with independent subject matter jurisdiction to review a decision rendered by a State commission pursuant to the 1996 Act. (*Id.* at 50a).

A. THE TELECOMMUNICATIONS ACT OF 1996

Congress enacted the 1996 Act, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §251 et seq.), to open the local telecommunications markets to competition.[3] The

[2] *Ex parte Young*, 209 U.S. 123 (1908).

[3] At the time the 1996 Act was passed, 19 states had in place rules opening the local exchange market to competition. In seven states, competing firms already had begun to offer switched local service. These states were California, Illinois, Maryland, Massachusetts, Michigan, New York and Washington. Competition rules were in place in Arizona, Colorado, Connecticut, Florida, Georgia, Iowa, Louisiana, North Carolina, Ohio, Oregon, Tennessee and Virginia. See, *Common Carrier Competition Report*, CC Report No. 96-9, FCC, Common Carrier Bureau (Spring 1996) at page 3.

1996 Act[4] imposes a general duty on all telecommunications carriers to interconnect with other telecommunications carriers. 47 U.S.C. §251(a). With regard to incumbent local exchange carriers ("ILECs") such as Verizon, the duty to interconnect is even more specifically defined by §251(c)(2). In conjunction with these interconnection obligations, the 1996 Act requires all local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of telecommunications. 47 U.S.C. §251(b)(5). For purposes of compliance with this subsection, the 1996 Act provides that such terms and conditions must provide for the recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carriers. Further, such terms and conditions must determine costs on the basis of a reasonable approximation of the additional costs of terminating such calls. 47 U.S.C. §252(d)(2)(A). However, ILECs may negotiate and enter in a binding agreement with a requesting carrier without regard to the standards set forth in subsections (b) and (c) of §251.

The procedures for negotiations between Competitive Local Exchange Carriers ("CLECs") and ILECs are governed by §252 of the 1996 Act. If negotiating companies cannot reach agreement, §252 provides that the parties may request that the appropriate State commission arbitrate unresolved issues. Each interconnection agreement must be submitted to the State commission for approval, regardless of whether the agreement was negotiated by the parties or arbitrated by the State commission. 47 U.S.C. §252(e)(1). However, the State commission may only reject a negotiated agreement if it finds that the agreement discriminates against a telecommunications carrier, or the implementation of such

[4] *See*, 47 U.S.C. §§251-261. The 1996 Act is codified throughout Title 47 of the United States Code. References to the 1996 Act are to the relevant sections of the Code.

an agreement is not consistent with the public interest. 47 U.S.C. §252(e)(2)(A).

B. PROCEEDINGS BEFORE THE MARYLAND COMMISSION

Pursuant to the 1996 Act, MFS Intelenet of Maryland, Inc. ("MFS") and Verizon entered into an interconnection agreement on July 16, 1996. The Maryland Commission approved this agreement on October 9, 1996. On April 28, 1997, Verizon informed MFS that it would discontinue payment of reciprocal compensation for calls to ISPs, claiming that the Agreement's reciprocal compensation provisions did not apply to calls to ISPs. On May 21, 1997, MFS filed a complaint with the Maryland Commission alleging that the actions of Verizon violated the 1996 Act and the MFS Agreement. On September 11, 1997, the Maryland Commission found that Verizon must pay reciprocal compensation to MFS for calls to ISPs under the terms of the Agreement. The Maryland Commission's decision was upheld by the Circuit Court for Montgomery County, Maryland.[5]

The Maryland Commission considered this issue a second time within the context of a Sprint Communications Company, L.P. ("Sprint") arbitration complaint. Sprint filed a Motion for Resolution of Disputed Issue, seeking a Commission ruling on how ISP-bound calls should be treated. The Maryland Commission concluded that ISP-bound calls "are classified as local in nature and are therefore, subject to reciprocal compensation" from Verizon.

On February 26, 1999, the Federal Communications Commission ("FCC") released an Order addressing the

[5] *Bell Atlantic Maryland, Inc. v. Maryland Public Service Commission*, Civil Action No. 178260, Docket Entry #26, March 26, 1998.

jurisdictional status of calls to ISPs.[6] The FCC concluded that "ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate." However, the FCC further concluded that given the absence of a "federal rule regarding the appropriate inter-carrier compensation mechanism for this traffic, that parties should be bound by their existing interconnection agreements, as interpreted by State commissions."[7] The *ISP Order* held that a carrier's right to reciprocal compensation for calls to ISPs was governed by the terms of the parties interconnection agreement. (Pet. App. 96a-97a). The FCC further held that there is "no reason to interfere with state commission findings" regarding ISP compensation *ISP Order* ¶21. The FCC described several factors that State commissions might consider in determining whether parties had agreed to pay reciprocal compensation for calls to ISPs. One factor was that for years both the FCC and ILECs traditionally treated calls to ISPs as local. ¶¶23-29. Pet. App. 97a-99a. In response to the *ISP Order*, Verizon asked the Maryland Commission to reconsider the previous decisions requiring reciprocal compensation for calls to ISPs.

On June 11, 1999, the Maryland Commission resolved the issue raised by Verizon. The Order has two distinct parts. First, with regard to the negotiated agreement, the Maryland Commission found that, under contract principles and using the analysis sanctioned by the FCC, parties to the agreement were entitled to reciprocal compensation for ISP-bound calls until July 1, 1999. (Pet. App. 103a-104a). Second, the Maryland Commission determined that parties who do not have approved interconnection agreements should receive the arbitrated

[6] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Declaratory Ruling, CC Docket 96-96, 14 F.C.C.R. 3689 (February 26, 1999). ("*ISP Order*")

[7] *Id.*, at para. 1. See, also, para. 22.

reciprocal compensation rates contained in the effective Statement of Generally Available Terms ("SGAT") as an interim compensation mechanism until the FCC establishes an appropriate inter-carrier compensation mechanism for ISP-bound traffic. (Pet. App. 106a-107a).

C. THE DISTRICT COURT DECISION

Verizon sought review of the Maryland Commission's Order in the United States District Court for the District of Maryland. First, Verizon objected to the Maryland Commission's determination that Verizon should continue to pay reciprocal compensation for ISP-bound calls pursuant to the terms of the previously approved interconnection agreement. Verizon also objected to the Maryland Commission's determination that CLECs who do not have approved interconnection agreements shall receive the arbitrated reciprocal compensation rates contained in the effective SGAT as an interim compensation mechanism.

On October 20, 1999, the District Court dismissed Verizon's Complaint, holding that: (1) the Maryland Commission and the individual commissioners were immune from suit under the Eleventh Amendment[8] (Pet. App. 77a-84a); (2) the Maryland Commission was an indispensable party under Federal Rule of Civil Procedure 19(b) so that the case could not proceed without the Commission (Pet. App. 84a- 86a); (3) alternatively, Verizon's challenge to that portion of the Commission's Order relating to the SGAT was not ripe for review (Pet. App. 86a-90a) and (4) the Eleventh Amendment would bar suit brought pursuant to 28 USC §1331. (Pet. App. 90a).

[8] Based on this holding, the District Court declined to address the Maryland Commission's contention that the Court lacked jurisdiction to review Commission decisions **enforcing** interconnection agreements (Pet. App. 76a n.3)

D. THE FOURTH CIRCUIT DECISION

Verizon and the United States Government appealed the District Court's decision. On February 14, 2001, the United States Court of Appeals for the Fourth Circuit affirmed the District Court's decision. The Fourth Circuit reached four major conclusions. First, and foremost, the Court of Appeals found that the federal proceeding brought pursuant to §252(e)(6) of the 1996 Act against the Maryland Commission is constitutionally barred. The Fourth Circuit expressly found that Congress did not clearly manifest an intent to condition a State commission's participation in the regulation of interconnection agreements on a waiver of sovereign immunity from private suit. (Pet. App. 19a).

Second, and equally important, the Fourth Circuit also found that an action brought in federal court against the individual commissioners was constitutionally barred. Among other reasons, the Court of Appeals found that a federal court action against the State commissioners would improperly expand the federal remedy selected by Congress. (Pet. App. 29a).

The third determination by the Fourth Circuit was that §252(e)(6) does not confer jurisdiction on the federal courts to review a State commission's enforcement decisions. The Fourth Circuit found that because federal courts are courts of limited jurisdiction, decisions by State commissions that are not expressly designated for review in federal court are left for review by State courts. (Pet. App. 35a). The Court of Appeals then held that State commission orders administering and enforcing interconnection agreements are not §252 determinations (Pet. App. 47a). Thus, according to the Court, these orders are reviewable only by State courts. (*Id.*)

Finally, with regard to federal question jurisdiction, the Fourth Circuit held that 28 U.S.C. §1331 does not provide federal jurisdiction because Congress intended federal jurisdiction to be limited to the grant in 47 U.S.C. §252(e)(6). The Court of Appeals found that it "would be nonsensical to conclude that even though Congress carefully articulated jurisdictional responsibility in the 1996 Act, it nonetheless intended to have 28 U.S.C. §1331 override this effort." (Pet. App. 48a). According to the Fourth Circuit, "[t]he simple fact that interconnection agreements are "creations of federal law" does not make their interpretation a sufficiently substantial federal question to confer jurisdiction under 28 U.S.C. §1331." (Pet. App. 49a) (citations omitted).

Judge King dissented, concluding that: (1) §252(e)(6) expressly confers jurisdiction on the federal courts to review the State's enforcement determinations; (*Id.* at 56a); (2) the States waived their sovereign immunity by participating in the regulation of interconnection agreements; and (3) the individual Commissioners could be sued for prospective injunctive relief. (*Id.* at 67a.) Judge King found it unnecessary to reach the 28 U.S.C. §1331 jurisdictional question. Id. at 58a n. 5. However, he asserted that the *Rooker-Feldman* doctrine was inapplicable. (*Id.*) (citations omitted).

SUMMARY OF ARGUMENT

1. Petitioners allege that the federal district courts have jurisdiction under 28 U.S.C. §1331.[9] However, Verizon's complaint does not meet the requirements necessary to

[9] Section 1331 provides in pertinent part, that "[t]he district courts shall have original jurisdictional of all civil actions arising under the . . . laws . . . of the United States."

establish jurisdiction under §1331.[10] The district courts have that jurisdiction which Congress grants through statute. Because federal question jurisdiction ultimately depends on an act of Congress, the scope of the district courts' jurisdiction depends on the Congressional intent manifested in the statute at issue.

An analysis of the four factors established in *Cort v. Ash,* 422 U.S. 66 (1975), can only result in the conclusion that a private right of action may not be inferred from the 1996 Act. Neither the language of the 1996 Act nor its legislative history indicates that Congress intended to create a private cause of action.

2. Furthermore, §1331 jurisdiction may be preempted by a doctrine which requires jurisdiction to reside elsewhere. Congress has not abrogated the State commission's sovereign immunity pursuant to §1331. The Supreme Court has expressly held that §1331 does not suffice to abrogate immunity for all federal questions. *Blatchford v. Noatak,* 501 U.S. 775, 786 (1991). In light of this statement, no reasonable argument could be made that §1331 constitutes an abrogation of state immunity.

3. Moreover, State commissions cannot be found to have constructively waived their sovereign immunity by implementing the provisions of the 1996 Act. The Supreme Court repudiated the doctrine of constructive waiver in *College Savings Bank v. Fla. Prepaid Postsecondary Education Expense Board,* 527 U.S. 666 (1999). The

[10] The party seeking the federal forum must establish the basis for the court's jurisdiction. In this instance, Petitioners have failed to allege that federal law creates any cause of action. Jurisdiction may not be sustained on a theory that the plaintiff does not advance. *Healy v. SeaGull Specialty Co.,* 237 U.S. 479, 480 (1915).

Maryland Commission cannot be found to have waived its sovereign immunity by implementing the requirements of the 1996 Act. Congress has not unequivocally provided that the Maryland Commission waives its sovereign immunity when implementing the 1996 Act.

4. Similarly, the *Ex parte Young* doctrine is inapplicable to this situation. This Court should find that the 1996 Act is a detailed remedial scheme. Thus, pursuant to the restrictions placed on the *Ex parte Young* exception in *Seminole,* the doctrine cannot be used to avoid the Eleventh Amendment bar. Furthermore, the 1996 Act clearly indicates that Congress contemplated that the **State** would be the respondent.

5. Finally, this Court should apply the *Rooker-Feldman* doctrine and find that the lower federal courts lack jurisdiction over this suit. The Maryland Commission performs a judicial act when implementing or enforcing the 1996 Act. Important concepts of federalism require that the federal district court refrain from taking jurisdiction over this case.

ARGUMENT

I. THE 1996 ACT DOES NOT CREATE A PRIVATE CAUSE OF ACTION

The district courts have only that jurisdiction which Congress grants through statute. Even though Congress has conferred general federal question jurisdiction on the district courts under 28 U.S.C. §1331 in terms similar to the constitutional provision, the term "arising under" in the statute is narrower than the similarly stated constitutional power. *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S.

480, 495 (1983). Because federal question jurisdiction ultimately depends on an act of Congress, the scope of the district courts' jurisdiction depends on the Congressional intent manifested in the statute at issue. As this Court has found, "the source of plaintiff's rights must be found, if at all, in the substantive provisions of the . . . Act which they seek to enforce, not in the jurisdictional provisions." *Touche Ross & Co. v. Redington,* 442 U.S. 560, 577, (1979).

There are two tests under which an action may present a federal question. The first asks whether federal law creates the cause of action. If so, federal question jurisdiction exits. *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). If state law creates the cause of action, the second test asks whether that cause of action poses a substantial federal question. *Smith v. Kansas City Title & Trust Co.,* 255 U.S. 180, 201 (1921).[11]

Courts begin with the presumption that if a statute does not expressly create a private cause of action, one does not exist. *See, Louisiana Landmarks Soc. Inc. v. City of New Orleans,* 85 F.3d 1119, 1123 (5th Cir. 1996). By now, Congress is well aware of this presumption and how to provide private remedies. *See, Touche,* 442 U.S. at 572.

Appellants arguments rest on the faulty assumption that the existence of a federal statute automatically gives rise to §1331 jurisdiction.[12] However, this Court has held that

[11] Since Verizon raised no state law claims, this second test is inapplicable to this appeal.

[12] Petitioners contend that if Congress had intended to restrict the jurisdiction of the federal district courts, it would have expressly precluded jurisdiction in the 1996 Act. This argument ignores the fact that federal district courts are courts of **limited** jurisdiction and only possess that jurisdiction which Congress expressly grants. Thus, "preclusive language" is unnecessary to establish that federal courts do not have jurisdiction.

"the fact a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Cannon University of Chicago,* 441 U.S. 677, 688 (1979). Instead, a court must carefully analyze the four factors that *Cort v. Ash*, 422 U.S. 66 (1975), identifies as indicative of Congressional intent to create a private right of action.

Under the settled framework for evaluating whether a private cause of action may be inferred from a statute, the factors considered include whether the plaintiff is part of the class for whose especial benefit the statute was passed; whether the indicia of legislative intent reveals a congressional purpose to provide a private cause of action or deny one; whether it is consistent with the underlying legislative scheme to imply such a remedy; and whether the cause of action is one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law. *Cort v. Ash*, 422 U.S. at 78 (1975). (internal citations and quotations omitted).

Unless Congressional intent to create a private cause of action can be inferred from the language of the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist. *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 94 (1981). Whether Congress has created an enforceable right is determined by its intent. *Smith v. Kirk*, 821 F.2d 980, 982 (4th Cir. 1987). Neither the language of the 1996 Act nor its legislative history indicates that Congress intended to create a private cause of action. [13]

[13] The argument presented by the United States regarding the legislative history of the 1996 Act fails to cite any legislative history to support its bald assertions. (U.S. Brief at 23-24)

The legislative history of the 1996 Act establishes that Verizon is not a part of the class for whose special benefit the statute was enacted. The Act itself expresses Congress' intent "to promote competition and reduce regulation in order to secure lower prices and higher quality services for ***American telecommunications consumers*** and encourage the rapid deployment of new telecommunications technologies." Telecommunications Act of 1996, Pub. L. No. 104-104, purpose statement, 110 Stat. 56, 56 (1996). (Emphasis added) In its report concerning the legislation, Congress specifically stated that:

> . . . in order to secure lower prices and higher quality services for **American telecommunications consumers** . . . the result will be lower prices to **consumers and businesses,** . . . a competitive edge for **American businesses**, . . . indeed, the enormous **benefits to American businesses and consumers** from lifting the shackles of monopoly regulation . . .

H.R. Rep. No. 204, 104th Cong., 2nd Sess. 47/8 (March 1996) (emphasis added). Thus, it is clear that the 1996 Act was enacted to benefit consumers, not ILECs such as Verizon.

Furthermore, an examination of the legislative history and statutory scheme presents no indication that Congress intended to create a private cause of action. The only express grant of federal jurisdiction in the 1996 Act, §252(e)(6),[14] is limited.

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[14] Section 252(e)(6) provides, in pertinent part, "In any case in which a State Commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate

Under §252(e)(6), a district court's review of a State commission's approval or rejection of an interconnection agreement is limited to whether the agreement meets the requirements of §§251 and 252. It does not by its terms cover other aspects of a State commission's decision, such as consistency with State law, or matters addressed in §253. *See*, e.g. *Puerto Rico Telephone Company v. Telecommunications Regulatory Board,* 189 F 3d. 1 (1st Cir. 1999). Thus, §252(e)(6) is a very limited jurisdictional provision.[15]

This Court has held that the express provision by Congress of one method of enforcing a substantive rule suggests that Congress intended to preclude others. *Northwest Airlines v. Transport Workers,* 451 U.S. at 93-94 (1981). *See also, Nat'l RR Passenger Corp. v. Nat'l Assoc. of RR Passengers,* 414 U.S. 453, 455 (1978) ("when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies."); *Northwest Airlines Inc.,* 451 U.S. at 97. ("The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.") Petitioners ignore this rule of statutory construction. The Fourth Circuit's conclusion that §252(e)(6) should be interpreted to curtail jurisdiction under §1331 is the correct application of this rule.

Federal district court to determine whether the agreement or statement meets the requirements of Section 251 of this title and this section."

[15] The Court should note that State court review is more efficient since State courts would have jurisdiction over the entire matter, including questions of State law. *See*, *Pennhurst v. Halderman,* 465 U.S. 89, 117 (1984).

Aside from the narrow remedy contained in §252(e)(6),[16] the 1996 Act also explicitly provides for federal court jurisdiction in two other sections. Section 274 creates federal jurisdiction in the electronic publishing area and Section 207 creates the same jurisdiction over interstate communications disputes. That Congress expressly provided for a private cause of action in these sections is evidence that when Congress wished to provide a private remedy, it knew how to do so and did so expressly. *Touche*, 442 U.S. at 572.

The conclusion that Congress did not intend to create a private cause of action is further supported by the fact that Congress considered, but failed to include, a private right of action in the 1996 Act for violations of an interconnection agreement. Section 257 of the Senate Bill expressly provided for a private right of action. S. Rep. No. 104-23, 104th Cong., 1st Sess., at 104-05. However, this provision was not enacted in the final legislation. Congress' express grant of federal rights of action in three sections of the 1996 Act while deleting a similar provision from the Senate Bill, demonstrates that Congress did not intend to create an implied cause of action.

Consideration of the first two *Cort* factors is dispositive. The language of the statute and its legislative history do not suggest that the Act was intended to create federal rights for the benefit of a class of persons but rather was intended to benefit the public at large through a regulatory scheme to be administered in large part by the States. *See, California v. Sierra Club*, 451 U.S. 287, 298 (1981). In *California,* this Court found that statutes which

[16] The district courts have construed §252(e)(6) narrowly. *See, e.g. Citizen's Utility Ratepayers Board v. McKee,* 946 F.Supp. 89 (D. Kan. 1996) (Plaintiff is not an aggrieved party under §252(e)(6); only the interconnecting service provider or affected local exchange carrier has standing pursuant to this provision.)

focus on the person regulated rather than the individuals protected create "no implication of an intent to confer rights on a particular class of persons." *Id. at 294. See, also, T.I.M.E., Inc. v. United States,* 359 U.S. 464 (1959); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.,* 341 U.S. 246 (1951) (Court is reluctant to imply causes of action under statutes that create duties on the part of persons for the benefit of the public at large). Nor is there any evidence that Congress anticipated that there would be a private remedy. In short, Congress did not intend a private federal remedy for violations of the statute that it enacted. Thus, the federal district court cannot exercise federal question jurisdiction and provide remedies for violation of the 1996 Act because assuming such jurisdiction is contrary to Congressional intent.[17]

This being the case, it is unnecessary to inquire further to determine whether the purpose of the Statute would be advanced by the judicial implication of a private action or whether such a remedy is traditionally relegated to state law. This Court has held that the federal judiciary will not engraft a remedy on a statute that Congress did not intend to provide. *California v. Sierra Club,* 451 U.S. at 297. These factors are only of relevance if the first two factors give indication of a Congressional intent to create the remedy. *Id., citing, Touche,* 442 U.S. at 574-576.

[17] The United States misconstrues the Maryland Commission's argument. The MDPSC contends that §252(e)(6) does not grant jurisdiction over enforcement orders. However, contrary to the United States misinterpretation (United State Brief at pg 22 n. 5), the MDPSC never argued that §252(e)(6) "revoked" federal court jurisdiction. The Maryland Commission correctly contends that the inclusion of this narrow remedy means that Congress did not intend for broader private causes of action to be implied. Not only are these contentions not in conflict, both are correct.

However, with regard to whether the remedy is traditionally relegated to State law, in this instance it clearly was traditionally the province of the State. As noted by Justice Thomas, since the invention of the telephone the States have been exclusively responsible for regulatory intrastate telephone service. *AT&T Corp., v. Iowa Util. Bd.*, 525 U.S. 366, 403 (1999) (Thomas, J., joined by Rehnquist, C.J. & Breyer, J., concurring in part and dissenting in part). The Maryland Commission was charged with regulating telephone service in 1910. Maryland Chp. Laws, Chp. 180 (1910). When Congress entered the telecommunications field by enacting the Mann-Elkins Act (Ch. 301 §7, 36 Sta. 544-45 (1910)), it did not preempt the States' regulation of intrastate phone service *AT&T,* 525 U.S. at 403. (Thomas, J.) This jurisdictional separation remained unaltered until the passage of the 1996 Act.

During this period, States created extensive regulatory schemes implementing their authority over intrastate telephone service. In all instances, these regulatory schemes included the creation of administrative bodies as well as methods for appealing the decisions of those bodies. *See, e.g.*, Annotated Code of Maryland, *PUC Article,* §§3-202, 3-204, 3-209. Even after the passage of the 1996 Act, primary responsibility for overseeing the implementation of §§251 and 252 remains with State administrative agencies.

The conclusion that the 1996 Act does not create a private cause of action negates Verizon's claim of federal subject matter jurisdiction.[18] In the absence of a federal statutory cause of action, declaratory relief is available only

[18] This conclusion is in keeping with the Supreme Court's long-standing presumption against finding private actions under the Federal Communications Act of 1934. *See, Scripps-Howard Radio, Inc. v. Federal Communications Comm'n,* 316 U.S. 4, 14 (1942). (Act of 1934 "did not create new private rights").

when a federal statute totally precludes State regulation of the matter being litigated. In other words, the federal statute must have entirely occupied the field, preventing any State regulation of matters within the scope of the federal statute. *Western Airlines, Inc. v. Port Authority of New York and New Jersey*, 817 F.2d 222, 225-26 (2nd Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). *See also, Burgio and Campofelice, Inc. v. NYS Dept. of Labor*, 107 F.3d 1000, 1007 (2nd Cir. 1997). A preemption cause of action for declaratory relief is not an alternative means for enforcing the substantive provisions of the federal statute. *Western Air Lines v. Port Authority of New York & New Jersey*, 817 F.2d at 225-26.

The District Court of California reached the same conclusion concerning a challenge to §254 of the 1996 Act. In this case, the California Public Utilities Commission ("CPUC") adopted two end-user surcharges to finance intrastate universal telephone service programs. The Utility Reform Network challenged this decision as being preempted by the Telecommunications Act of 1996. The California District Court found that an individual may challenge State regulations despite the lack of statutory cause of action only when a federal statute forbids State regulation of the area that the State is purporting to regulate. In other words, only when the federal statute had "occupied the field" thereby preventing any State regulation of matters falling within the scope of the federal statute. *Turn v. CPUC*, 26 F. Supp. 2nd 1208, 1213 (N.D. Cal. 1998) The California court specifically noted that it was "not aware of any authority holding that a preemption cause of action may serve as a vehicle to challenge an otherwise permissible State regulation simply because it allegedly violates a substantive provision of a federal statute." *Id.* The Court concluded that the plaintiff could not challenge the CPUC's compliance with

the substantive provisions of the 1996 Act by means of a preemption cause of action. *Id.* at 1213-1214.

Several other courts also have found that jurisdiction is limited to the 1996 Act. In *Indiana Bell v. McCarty,* 30 F. Supp. 2d. 1100, 1102 (S.D. Ind. 1998), the district court explained that where Congress provides a means to seek review of an agency determination, alternative means of review are inapplicable. *Accord, see Michigan Bell v. MFS Intelenet,* 16 F. Supp. 2d. 710 (W.D. Mich. 1998); *GTE Northwest v. Nelson,* 969 F. Supp. 654, 656 (W.D. Wash. 1997). The conclusion of these courts is in keeping with the Supreme Court's decision in *Seminole Tribe v. Florida,* 517 U.S. 44 (1996), which stands for the proposition that Congress' particular choice of remedies must be respected. Respect for Congressional intent means that generalized statutes cannot be used in place of the tailored ones Congress created.

No reasonable argument could be made contending that the 1996 Act entirely preempts State regulation of local exchange service or local exchange carriers. Among a variety of other things, §252 requires a State commission to determine rates in the context of an arbitration. *See, e.g.*, §§251(c)(4) and (6); 251(d)(3); 251(f), 252, 253(b) and (f), 254 and 261(c).

Contrary to Petitioners' assertions, the Fourth Circuit's interpretation and reliance on *Jackson Transit Authority v. Local Division 1285,* 457 U.S. 15 (1982), was correct. In *Jackson*, the Court found that the mandatory incorporation of federal standards into a contract did not necessarily create federal question jurisdiction in an action based on a breach of those standards. *Jackson* involved a suit by a union alleging breach of a "§13(c) agreement", which preserved transit workers preexisting rights. This

guarantee was required by §13(c) of the Urban Mass Transportation Act of 1964, 41 U.S.C. §1609(c). The union argued that because the contract rights were guaranteed federal law, its complaint stated claims arising under federal law. The Court rejected that argument and found that Congress did not intend such contract actions to set forth federal claims. *Id.* at 21.[19]

Ironically, WorldCom's argument actually supports the Maryland Commission's position. WorldCom agrees that it is a question of State law "whether the interconnection agreement includes a dynamic incorporation of statutory interpretation." WorldCom Brief at 20. (citing Fourth Circuit Opinion at 27a). WorldCom also agrees with the Fourth Circuit's conclusion that merely because Congress required parties to enter into a contract does not render interpretation of that contract a federal question. *Id.* (citing Fourth Circuit Opinion at 49a) As stated by WorldCom, "nothing in the Act suggests that Congress intended to transform every question regarding the meaning of an interconnection agreement into a federal question." *Id.*

However, WorldCom misreads *Jackson* when it states that the Court found that federal district court had jurisdiction over the union's complaint. To the contrary, the *Jackson* Court merely found that the federal district court had jurisdiction to determine whether the union had a cause of action. 457 U.S. at 21 n.6. The *Jackson* Court found that

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[19] A few years later, the Fifth Circuit also found that a contract incorporating a federal regulatory standard does not give rise to federal question jurisdiction. *Oliver v. Trunkline Gas Co.,* 796 F.2d 86, 89 (5th Cir. 1986). ("We are aware of no cases in which any court . . . has held that a private contract can give rise to federal-question jurisdiction simply by incorporating some federal regulatory standard that would not be binding on the parties by its own force.")

the union had no cause of action, thus the federal court had no jurisdiction to entertain the union's complaint.

Applying the rationale of *Jackson* to the current situation, the Court should find that the interconnection agreement does not create federal question jurisdiction. The rights of both the ILEC and the CLEC are created by their contract, which may incorporate the federal standards. The 1996 Act expressly provides that the ILEC may negotiate an interconnection agreement without regard to the standards in §§251 (b) and (c). §252(a). Thus, any federal standards incorporated into a negotiated interconnection agreement were included at the choice of the parties. The parties, by their own choices, cannot create federal question jurisdiction.

Verizon's argument analogizing interconnection agreements to federal tariffs is only half correct. These agreements are analogous to tariffs, but to *State* tariffs not federal tariffs. Verizon's contention ignores that the State commission establishes the rates, provides the schedule for implementation and ensures that the rates and conditions meet the requirements of §251 and §252(c). The State commission is required to determine the wholesale prices for telecommunications services §252(d)(3). The State commission also may establish or enforce other requirements of State law in its review of that agreement §252(e)(3). The approved interconnection agreement is filed with the State commission, which has the obligation to make each agreement available for public inspection §252(h). Furthermore, Maryland, like other States, includes arbitrated rates in the Statement of Generally Available Terms ("SGAT"), which is a tariff filing available to any CLEC. See, §252(f). Thus, the interconnection agreements are analogous to State tariffs, not federal tariffs. The State commission exercises full responsibility for the terms and

conditions, even the responsibility of making those terms available to others.[20]

Verizon's contention that Maryland lacked authority under State law to hear complaints arising from interconnection agreements is simply incorrect. The terms of an interconnection agreement are established pursuant to State Commission order. The agreement is approved by State Commission order. Thus, a violation of any agreement is a violation of a Commission order subject to the full State enforcement powers of the Maryland Commission.

Petitioners have set up a strawman argument in an attempt to distract the Court from the real issue in this case. Contrary to Petitioners' assertions, the question in this proceeding is not whether anything in §252 withdraws federal question jurisdiction. This argument ignores the ample precedent of this Court establishing that federal district courts are courts of limited jurisdiction and thus only have that jurisdiction expressly granted by Congress. Petitioners' argument turns this proposition on its head and requires the Court to make the unprecedented finding that under §1331 federal district courts can hear virtually any claim unless Congress has expressly barred the court from hearing that claim.

The cases cited by Petitioners do not support the proposition they are espousing. This is not surprising given that the Petitioners present such novel view of the law. None of the authorities provided by the Petitioners support the concept that federal district courts can exercise §1331 jurisdiction in this instance.

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[20] The authorities cited by Verizon are inapposite because all involved tariffs approved by and filed with federal agencies.

The main authority cited by Verizon actually supports the Maryland Commission's position. In *International Association of Machinists, AFL-CIO v. Central Airlines, Inc.*, 372 U.S. 682 (1963), the Court examined the act at issue, its history and purposes. Based on this analysis, the Court found that the plaintiffs had a cause of action and the federal district court could exercise jurisdiction.[21] Thus, though required by federal law, the contract disputes did not "automatically" come within the federal district courts' jurisdiction.

Petitioners other authorities are simply inapposite. For example, Verizon cite *Bowen v. Michigan Academy of Family Physicians,* 476 U.S. 667 (1986) and *Stark v. Wickard,* 321 U.S. 288 (1944) to support its claim of jurisdiction. However, these cases involved federal agencies arguing that specific decisions were totally shielded from any court review. In contrast, the Maryland Commission contends that it's order is subject to review, but only by a State court. *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991) is similarly inapposite. *McNary* involved the specific issue of whether plaintiffs claims came within a specific statutory provision barring jurisdiction in certain circumstances. The sole issue was the applicability of this bar, the parties having conceded that in the absence of this statutory provision the plaintiffs had a cause of action.

WorldCom relies on *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 583 (1998). In *Steel Co.* the statute at issue expressly provided for a citizen suit. Thus, plaintiffs did not have to establish a general cause of action, the question was whether this provision allowed for suit based on a historical violation. There was no question that the

[21] This Court should note that the *Central Airlines* decision was rendered prior to the Court's decision in *Cort v. Ash*, *supra*, which established the four factors used to determine whether a private cause of action exists.

statute authorized the plaintiffs to sue.[22] Finally, the Petitioners inappropriately rely on a footnote in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983). *Shaw* however involved a State regulation which was allegedly preempted by federal law. In the present instance the Maryland Commission's decision cannot "conflict" with the *ISP* Order. The Maryland Order expressly interpreted and applied the FCC decision. While one may argue that this interpretation is erroneous, to claim that the Maryland Order "conflicts with" or is "preempted by" the FCC Order is simply a misnomer. Since the Maryland Commission did not apply any State law which may be said to be preempted by a federal law, Petitioners' reliance on *Shaw* is misplaced.

Contrary to Petitioners' assertions, the federal district courts enjoyed no "preexisting jurisdiction" under the 1996 Act. Section 601 of the 1996 Act provides that the Act shall not be construed to modify or supercede Federal law. Federal law includes the requirement that plaintiffs establish a cause of action, either express or implied, under §1331 in order to establish jurisdiction. Petitioners' novel arguments regarding preexisting jurisdiction and express statutory bar should be rejected by this Court.

This Court should find that the 1996 Act does not create a private cause of action, nor does it "occupy the field," thereby preventing any state regulation of matters falling within the scope of the federal statute. Given these conclusions, the Court should hold that the district court did not have jurisdiction pursuant to 28 U.S.C. §1331.

[22] The main question resolved by the Court was whether a court must resolve the Article III standing issue prior to resolving the statutory jurisdictional question.

II. THE ELEVENTH AMENDMENT MANDATES THAT THIS CASE BE DISMISSED.

A. The Maryland Commission Has Not Waived Its Sovereign Immunity.

Generally, the Eleventh Amendment divests federal courts of jurisdiction over suits brought by private parties against a state. *See, Marie O. v. Edgar*, 131 F.3d 610, 614 (7th Cir. 1997). The Eleventh Amendment presupposes that each state is a sovereign entity in the federal system and that "[i]t is inherent in the nature of sovereignty not to be amendable to the suit of an individual without [a state's] consent." *Hans v. Louisiana*, 134 U.S. 1 (1890). This Amendment has been interpreted to bar federal jurisdiction over suits against a state arising under the Constitution or Laws of the United States, whether those suits are brought by citizens of another state or by the state's own citizens. *Id.* The Eleventh Amendment imposes a constitutional limitation on the jurisdiction of Article III courts. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98 (1984). Eleventh Amendment immunity is similarly applicable to the Commission as an arm of the State of Maryland. *See, Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 142-46 (1993).

Previously, the Supreme Court identified three instances in which the Eleventh Amendment does not deprive an Article III court of jurisdiction to entertain allegations of state governmental wrongdoing. First, Congress may abrogate the States' Eleventh Amendment immunity "by making its intention unmistakably clear" in the text of a federal statute enacted pursuant to a constitutional provision that empowers Congress with abrogation rights. *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989). Second, a state may waive Eleventh Amendment immunity *Parden v.*

Terminal Ry. Co., 377 U.S. 184 (1964). Finally, a court may consider a suit against a state official to enjoin a non-discretionary violation of federal law. *Ex parte Young*, 209 U.S. at 159-60.

This Court has repeatedly held that the Congressional power to abrogate the States' sovereign immunity can only be exercised by a clear legislative statement. *Dellmuth v. Muth*, 491 U.S. at 227-228 (1989). In *Blatchford v. Noatak*, 501 U.S. 775 (1991), the Supreme Court expressly found that §1331 does not suffice to abrogate immunity for all federal questions. *Id.* at 78. As noted by the *Blatchford* Court, "the fact that Congress granted *jurisdiction* to hear a claim does not suffice to show Congress has abrogated all *defenses* to that claims." *Id.* at 786 n. 4 (Emphasis in original).

This Court's recent *Seminole* decision places limitations on a party's ability to bypass a State's immunity from suit in federal court. The decision restricts the power of Congress to abrogate state immunity. The decision also narrows the scope of the *Ex parte Young* exception to Eleventh Amendment immunity. Finally, *Seminole* arguably left open the issue of whether a State may impliedly waive its immunity to suit in federal court.

However, in *College Savings*, the Supreme Court repudiated the doctrine of constructive waiver. The Court found that the "constructive waiver experiment was ill conceived" and it overruled "whatever may remain of *Parden*," that doctrine's seminal decision.

Petitioners below maintained that constructive waiver is possible when Congress provides unambiguously that a State will be subject to suit if it engages in certain federally regulated conduct and the State voluntarily engages in that

conduct. The Supreme Court disagreed, finding that even an unambiguous statement of Congressional intent cannot be reconciled with the requirement that a State's waiver of sovereign immunity be unequivocal. *College Savings*, 527 U.S. at 680. (Citations omitted). Thus, a state does not consent to suit in Federal court simply by engaging in federally regulated conduct even where Congress has provided that the State will be subject to private suit if it engages in that conduct. *Id.* at 680-681. *See also, Fla. Dept. of Health v. Fla. Nursing Home Asso.*, 450 U.S. 147, 150 (1981) (State's participation or agreement to administer a federal program does not constitute a waiver of Eleventh Amendment immunity).

This Court should determine that the Maryland Commission cannot be found to have waived its sovereign immunity for two reasons. First, Congress lacks the constitutional authority, pursuant to the Commerce Clause, to condition the State's participation on that state's waiver of its Eleventh Amendment immunity. Second, the 1996 Act is neither a "gift" nor a "gratuity".

1) Congress Lacks the Constitutional Authority to Condition Grants Under the Commerce Clause.

In light of *Seminole* and *College Savings*, even assuming Congress expressly conditioned state participation in the regulatory scheme of the 1996 Act on waiver of the State's immunity to suit in federal court, Congress nevertheless was without authority to do so under the Commerce Clause. Art. I §8, Cl. 3. Any argument based on constructive waiver presupposes that Congress has the authority pursuant to Article I of the Constitution to force a state to waive its Eleventh Amendment immunity as a condition of participating in a field subject to federal

regulation. However, the *Seminole* Court stated in no uncertain terms, that "the Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed on federal jurisdiction." 517 U.S. at 72-73. Thus, as noted by the *College Savings* Court, the *Seminole* decision "expressly repudiates" the proposition that Congress has authority, under the Commerce Clause, to expand Federal jurisdiction. *College Savings,* 527 U.S. at 683. Therefore, allowing federal courts to apply the doctrine of constructive waiver based on Congress' commerce powers would directly contravene the Supreme Court's express repudiation of this doctrine in *Seminole*.

The *Seminole* Court found that Congress cannot abrogate a state's Eleventh Amendment immunity pursuant to the Commerce Clause. 517 U.S. at 69. More specifically, the *Seminole* Court stated that "[e]ven when the Constitution rests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents Congressional authorization of suits by private parties against unconsenting states." 517 U.S. at 72. The impact of *Seminole's* conclusion was explicitly stated by the *College Savings Court*, which found that "[r]ecognizing a congressional power to extract constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the anti-abrogation holding of *Seminole Tribe*." 527 U.S. at 683.

Therefore, the conclusion that Congress could have excluded states from any role in the 1996 Act is irrelevant to determining whether a state has constructively waived its immunity. Under analysis, Congress would be permitted to do indirectly what it cannot do directly, namely, abrogate a state's immunity pursuant to the Commerce Clause by

making abrogation a "condition" of participation. See, eg. *Abril v. Virginia*, 145 F.3d 182, 190 n. 15 (4th Cir. 1998).

Since Congress has no authority under its Article I Commerce Clause powers to abrogate state sovereign immunity, *Seminole* 517 U.S. at 71-72, it follows the Congress may ***not*** make the waiver of sovereign immunity a condition to the state's action in a field that Congress has authority to regulate under the Commerce Clause. In the present case, where Congress is not empowered to abrogate the Eleventh Amendment immunity conferred upon the Commission directly, likewise it cannot do so indirectly through principles of constructive waiver. The Maryland Commission has not waived such protection by voluntarily participating in the regulation of telecommunications. The telecommunications industry indisputably involves a quintessential state interest - the provision of telecommunications services to the citizenry at competitive rates - protection of which Congress cannot condition on a state's waiver of vital state rights.

This Court should find that Congress lacks the constitutional authority to require states to waive their Eleventh Amendment immunity when it enacts legislation pursuant to the Commerce Clause. Since the Supreme Court has previously ruled that Congress cannot abrogate States' immunity through the Commerce Clause, it would be illogical to permit Congress to condition any "gift" on accepting abrogation of Eleventh Amendment immunity pursuant to this very same constitutional provision.

2) The 1996 Act is Neither a Gratuity Nor a Gift to the States from Congress.

In a strained effort to avoid the obvious impact of *College Savings*, Petitioners below contended that the 1996

Act is a "benefit" from Congress to the States and that, therefore, Congress is entitled to place conditions on the acceptance of that gift. This Court should reject this distortion of the *College Savings* analysis.

The threshold question is whether Congress had "unequivocally" expressed its intent that waiver of Eleventh Amendment immunity was a condition of the State's participation in the 1996 Act. The Supreme Court has required "an unequivocal expression of congressional intent" to obtain an Eleventh Amendment waiver from states. *Atascodero*, 473 U.S. 234, 238-40 (1985).[23] Congress must state the condition unambiguously. *Pennhurst State Sch. & Hosp. v. Halderman,* 451 U.S. 1, 17 (1981). Congress must speak with a clear voice so that the States many exercise their choice to waive their immunity "knowingly cognizant of the consequences of their participation." *Id.*

Plainly, §1331 does not unequivocally express Congressional intent that a State waive its sovereign immunity when implementing the 1996 Act. As noted earlier, this Court has held that §1331 does not abrogate a States' Eleventh Amendment immunity. *Blatchford, supra.* This same provision certainly cannot be viewed as unambiguously requiring that States waive their sovereign immunity as a condition of participating in the regulatory scheme. In short, §1331 lacks the clear statement necessary so that a state participating in the 1996 Act's implementation requirements can choose to participate or not, fully cognizant

[23] In *Atascadero,* the Court held that a general jurisdiction provision "is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment" and that it "likewise falls far short of manifesting a clear intent to condition a clear intend to condition participation in the program funded under the Act on a state's consent to waive its constitutional immunity. *Id.* at 246.

that Congress intended that this participation would subject the State to suit in federal district court pursuant to §1331.

The State commissions are merely agreeing to obey federal laws in participating in a federal program. Agreeing to obey federal law does not constitute an agreement to be sued in federal court. Prior to the enactment of the 1996 Act, State commissions could and did resolve disputes between ILECs and CLECs. A brief review of the regulatory changes which occurred in Maryland prior to the 1996 Act will demonstrate this fact.

Maryland began opening the local telephone service market to competition in 1993. On July 26, 1993, MFS applied for authority to become a local exchange service provider in the areas of Maryland served by Verizon. In addition, MFS petitioned the Commission to establish specific policies and requirements for the interconnection of competing local exchange networks. In setting the application for hearing, the Commission concluded that the proceeding should serve to establish generic policies and requirements for telecommunications carriers.

In Phase I, the Commission approved the unbundling of local exchange links and ports.[24] The Commission also granted MFS authority to provide telephone services in Maryland. Verizon was required to provide for interconnection with MFS. An interim interconnection rate also was established for local call termination on Verizon's network. In addition, MFS was permitted to file a tariff, with cost support, to establish a charge for the termination of calls on its own network. In Phase II, the Commission set

[24] *Re MFS Intelenet of Maryland, Inc.*, 85 Md. PSC 38 (April 25, 1994).

the rates, term and conditions for interconnection between the carriers.[25]

Maryland's experience with opening the local market to competition demonstrates that the 1996 Act was not a "benefit" but an unwarranted intrusion. Maryland's only "gains" under the 1996 Act were a loss of autonomy. Prior to the 1996 Act, Maryland had sole authority over its local exchange market. After the Congressional enactment, Maryland is now forced to share that authority with the FCC and can even be preempted by that agency. Certainly no reasonable person would interpret this outcome as a "benefit" or "gift" to Maryland. In actuality, all the benefits flowed to the FCC, which is permitted to usurp the State's traditional regulatory authority, and utilize State resources in implementing the 1996 Act.

Furthermore, participation by the States in the 1996 Act's regulatory scheme was not voluntary. Regulation of local exchange carriers traditionally has been within the police powers of the State. The telecommunications industry indisputably involves a quintessential "state interest" - the provision of telecommunications services to the citizenry at competitive rates-protection of which Congress cannot condition on a State's waiver of vital rights. Upon passage of the 1996 Act, a State was forced to either abide by the federal regulations or cede its power to regulate to the FCC (a classic Hobson's choice). The option of either consenting to federal regulation and waiving immunity or losing the previously held power to regulate a local exchange carrier is not a choice that any court should perceive as voluntary.

The linchpin of the contention that the 1996 Act constitutes a "gift" is §252(e)(5). The Petitioners argued

[25] *Re MFS Intelenet of Maryland, Inc.*, Phase II, 86 Md. PSC 467, 470-71 (Dec. 28, 1995).

below that this provision rendered the state's participation in the 1996 Act voluntary because the FCC would take over the responsibilities of any state who "chooses" not to participate. However, Petitioners interpretation of this section is overly broad and contrary to the plain meaning of that provision. Section 252(e)(5) states "if a State commission fails to act to carry out its responsibility under this section **in any proceeding or other matter** . . . the [FCC] shall issue an order preempting the State commission's jurisdiction **of that proceeding or matter** . . . and shall assume the responsibility of the State commission . . . **with respect to the proceeding or matter** . . . . "(emphasis added).

Clearly, this provision envisions the FCC assuming jurisdiction over discrete proceedings or matters, not taking over wholesale responsibility for telecommunications regulation in state. This conclusion is supported by the Joint Committee of Conference Report which described the Senate provision as requiring that the FCC "shall assume the responsibilities of the State in the **applicable proceeding or matter**." H.R. Conf. Rep. No. 104-458 (1996), reprinted in 1996 U.S.C.C.A.N. 124 (emphasis added) Congress could not have contemplated the FCC taking full responsibility for regulatory local service in the States. The reason the States are included in the 1996 Act is not "in the spirit of federalism" but because the federal government is incapable of regulating such a vast industry on its own. Essentially, Congress is using the States to implement a program that the federal government would be incapable of carrying out on its own.

More critically, the FCC severely undermined any "voluntary" aspect of a State's "opting in" by stating explicitly that, in assuming jurisdiction over a matter, "it shall not be bound by State laws and standards that would

have applied to the State commission in such proceeding or matter." 47 CFR §51.807(b). So much for "genuine choice."

Finally, several federal courts have held that they will not review interconnection agreements for violations of state law. *See, e.g., Illinois Bell v. WorldCom*, 179 F.3d 566, 571 (7th Cir. 1999). Thus, if a State commission had "opted out" of the 1996 Act, State law requirements would not even receive any consideration and parties who operate in violation of State law could do so with impunity.

The above are not "genuine choices" that fall within those limits articulated for a preemptible field in *FERC v. Mississippi*, 456 U.S. 742 (1982). The 1996 Act passed the "point of coercion" because the effect of Maryland's refusal to waive its immunity is the exclusion of the State from an otherwise lawful activity. *See, College Savings,* 527 U.S. at 687. Under the 1996 Act, a State has the choice of seeing its commission frozen out of effective enforcement of state-related service and interconnection issues, as well as federal matters under §§251 and 252, **or** the State is stripped of its immunity from federal judicial review. The States are thus denied that "dignity and respect" to which a sovereign State is entitled.

There is no arguable basis to conclude that the State's continued regulation of local telephone carriers is a "benefit" from Congress, which justifies constructive waiver of Eleventh Amendment immunity. This Court should hold that abrogation of Eleventh Amendment immunity as the price of "opting into" the scheme created in §252 is an invalid option in light of *Seminole* and *College Savings.* Therefore, the Commission's Eleventh Amendment immunity was not waived through its participation in §252 arbitration proceedings. The 1996 Act's requirement of federal district court review is unconstitutional.

B. This Proceeding Does Not Meet the Requirements of the *Ex parte Young* Exception

Verizon attempted to avoid the bar of Eleventh Amendment sovereign immunity by naming the Commission members individually in their official capacities. *See, Ex parte Young*, 209 U.S. 123 (1908). *Seminole* represents the first Supreme Court decision since *Ex parte Young* to hold that the Eleventh Amendment bars an action against a State official for purely prospective relief to prevent ongoing violations of federal law.

Relief under *Ex parte Young* may be foreclosed if the statute in question provides "a detailed remedial scheme," if that remedy is "significantly more limited than . . . the liability upon the state officer under *Ex parte Young"* and if Congress did not to "authorize federal jurisdiction under *Ex parte Young* over a causes of action with a limited remedial scheme." *Seminole,* 517 U.S. 44, 74-75 (1996).

The *Seminole* Court found that "where Congress has prescribed a detailed remedial scheme for the enforcement against a state of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." *Seminole*, 517 U.S. at 74. This Court should find that the 1996 Act constitutes a comprehensive statutory scheme and thus the *Ex parte Young* doctrine does not apply.

In *Seminole*, after rejecting the tribe's abrogation argument, the Court turned to the tribe's alternative contention that *Ex parte Young* served as a means by which to obtain relief in federal court. The tribe contended that

federal court jurisdiction existed to proceed in an action against the Governor to obtain injunctive relief.

However, the *Seminole* Court held the *Ex parte Young* doctrine inapplicable. The Court reasoned that in contrast to the "modest set of sanctions" Congress established in the IGRA, a suit under *Ex parte Young* would expose the defendant State official to the "full remedial powers of a federal court." Also, allowing a suit for relief under *Ex parte Young* would render ineffective the remedies Congress designed. The Court acknowledged that Congress has authority to establish federal court jurisdiction over State officials comparable to *Ex parte Young* jurisdiction, but concluded that Congress had not applied such authority when it wrote the IGRA. Of significance, the Court ruled that even though Congress' remedial scheme under the IGRA did not work because it violated the State's Eleventh Amendment rights, the Court could not "rewrite the statutory scheme in order to approximate what we think Congress might have wanted." *Seminole*, 517 U.S. at 74-76.

The *Seminole Tribe* decision places an obligation on the federal courts to examine Congressional intent with respect to the scope of statutory remedies that may be available in any case where the *Ex parte Young* doctrine is asserted to remove the Eleventh Amendment bar. Application of the Supreme Court doctrine espoused in *Seminole* must lead to the conclusion that finding jurisdiction under *Ex parte Young* in this instance would be inappropriate. In *Seminole*, the Supreme Court found that when a statute implies that Congress intended an alternative, specific form of relief be available to enforce compliance with that statute, a court should infer that Congress did not intend the federal court to provide traditional *Ex parte Young* injunctive relief.

The Tenth Circuit recently applied the *Seminole* analysis to reach the conclusion that Titles IV and XX of the Social Security Act created detailed remedial schemes for enforcement. In *Joseph A. v. Ingram,* 262 F.3d 1113 (10th Cir. 2001), the Tenth Circuit noted that under Title IV the State's were required to adhere to a comprehensive set of statutory and regulatory standards imposing federally-defined objectives, administrative procedures and appeals. The Titles also provide for federal oversight of the plans by the Department of Health and Human Services ("HHS"). HHS has the authority to dictate the terms of the plan. States that fail to comply with the planning face a reduction in their funding eligibility. The Tenth Circuit held that the comprehensive statutory and regulatory provisions governing Titles IV and XX demonstrated that Congress meant to preclude reliance on the broad provisions of an *Ex Parte Young,* suit to enforce the federal statutory standards.

Applying the *Ingram* analysis to the 1996 Act, this Court must conclude that the 1996 Act is a detailed remedial scheme. The State commissions are required to adhere to a comprehensive set of statutory and regulatory standards imposing federally defined objectives and administrative procedures. *See*, §§252(b)(4), (c), (d), (e)(1) and (e)(2). The 1996 Act provides for federal oversight by the FCC. *See*, §251(d). Failure of a State commission to carry out its responsibility in a proceeding may result in the FCC preempting the State commission's jurisdiction over that proceeding. §252(e)(5).

Furthermore, the remedial scheme of the 1996 Act includes a federal court remedy to allow for a review of an interconnection agreement to determine whether the agreement complies with §§251 and 252. But this federal court remedy does not contemplate injunctive relief. In addition, the 1996 Act imposes no set of judicial sanctions

against a state commission for failure to timely adhere to the expedited timetable. Clearly, the federal court relief available under §252(e)(6) is far less onerous than the relief that would be available pursuant to an *Ex parte Young* suit. Section 252(e)(6) only allows for a review of an interconnection agreement whereas an *Ex parte Young* action against a state commission would expose the Commissioners to the full remedial powers of a federal court, including presumably, contempt sanctions. Thus, to allow an *Ex parte Young* action against the Commissioners would be to "rewrite the statutory scheme", render superfluous the limited statutory remedy provided under §252(e)(6) and would permit the plaintiff to obtain relief against the individual Commissioners that they could not otherwise obtain pursuant to §252(e)(6).

Any attempt to achieve jurisdiction through the *Ex parte Young* fiction rather than through a §252(e)(6) action will frustrate Congress' clear intent that the 1996 Act provides the ***exclusive*** remedies against the state commissions. Like the statute in S*eminole,* §252(e)(6) does not "stand alone" but was created in the context of a carefully crafted remedial scheme. Just as the *Seminole* Court refused to replace Congress' unconstitutional attempt to abrogate states' immunity with a judicially created remedy, so to should this Court refuse to apply *Ex parte Young* to the 1996 Act.

Another factor militating against use of *Ex parte Young* relief is the fact that Congress clearly intended for §252(e)(6) actions to proceed against State commissions, not individual commissioners.

In *Seminole*, the Court observed that the statute indicated that Congress clearly contemplated that the state would be the respondent and repeatedly referred to "the

State." *Seminole*, 517 U.S. at 75. According to the Court, where a statutory scheme unmistakably authorizes a State or its agency to act, as opposed to an individual State official, *Ex parte Young* does not provide a vehicle whereby relief may be obtained. *Id.* 75 n.17. Thus, the *Seminole* Court determined that absent explicit Congressional authorization, Courts should not permit the use of an *Ex parte Young* actic to negate a state's sovereign immunity.

In *Seminole*, the Court looked to the federal statute at issue and determined that it was not Congress' intent to create a cause of action against the state officials, relying on a literal reading of the statute to support this analysis. Thus, in order to determine whether Verizon's action against the Commissioners may proceed, this Court is required to determine whether Congress intended to limit the availability of *Ex parte Young* suits over a cause of action brought under the 1996 Act.

In the 1996 Act, **all** of the provisions in §§251 and 252 refer to the "State Commission" or "the State" and **none** of the provisions refer to individual State commissioners. Section 252(e)(6), the statutory provision relied upon by the plaintiffs to initiate this case, is entitled "Review of State Commission Actions". That heading alone implies that an appeal will be filed against the State Commission. Section 252 refers forty-five times to the "state commission" with four such references contained in the subsection headings. See, 47 U.S.C. §§252(b)(4)(e), (e)(6), and (f)(2). Section 252 never refers to individual state commissioners. This overwhelmingly demonstrates that Congress designed the §252(e)(6) action to proceed against the **State commission**.[26]

[26] In fact, the actions Verizon complained of could not be accomplished by any of the five Commissioners acting alone. The Commission only can act by majority vote on such a matter. It is the action of the Commission as an entity that is required under the 1996 Act as a

It is illogical to infer that Congress intended to subject State commissioners to broad federal injunctive relief and contempt powers. Congress would have expressly provided for such a significant remedy had it intended to do so. Thus, the district court was without jurisdiction to proceed against the individual commissioners.

The Congressional remedy crafted into the 1996 Act does not authorize a suit against a state official as required by *Seminole*, 517 U.S. at 75. Congress' remedial scheme does not include State commissioners as parties to actions brought under §252(e)(6). "When Congress crafts particular remedies for particular wrongs, the presumption is that these are the exclusive remedies and that such limitations as they may embody are not to be circumvented . . . " *McDonnell v. Cisneros*, 84 F. 3d 256, 261 (7th Cir. 1996). The fact that Congress created on unconstitutional remedy, which allowed for suit against the state does not change this result.

This Court should find that, pursuant to the rule espoused in *Seminole*, Congress did not provide for the type of relief available under *Ex parte Young* in the 1996 Act.

Another critical limitation on the *Ex parte Young* doctrine is that a State officer must have exceeded his authority in order to be subjected to an *Ex parte Young* suit. As the Court explained in *Larson v. Domestic & Foreign Comm. Corp.* 337 U.S. 682 (1949), an *ultra vires* claim exists on "the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient" *Pennhurst*, 465 U.S. at 101 n. 11 (quoting *Larson v. Domestic & Foreign Comm. Corp.*, 337 U.S. 682, 690 (1949)). Thus, mere assertions of good faith error in the

prerequisite to judicial review by this Court, not the actions of the individual Commissioners.

exercise of lawful authority, such as Verizon's contention that the Maryland Commission misinterpreted the FCC Order, do not support an action under *Ex parte Young*.

Verizon's suit falls well beyond the ambit of the *Ex parte Young* paradigm. The Maryland commissioners are not alleged to have violated any constitutional provisions, nor are they alleged to have exceeded the scope of their authority under the 1996 Act. Verizon did not contend that the commissioners failed to perform a mandatory duty nor interpreted or applied state law in a manner contrary to the United States Constitution or federal law. Verizon must concede that the Maryland Commission was empowered to consider its dispute, Verizon itself selected the initial forum. Thus, there can be no contention that the commissioners have acted on a matter that is outside their jurisdiction. Because a claim of error in the exercise of lawful authority is not sufficient to strip the Commissioners of their sovereign immunity, Verizon's suit is barred by the Eleventh Amendment. *Pennhurst,* 464 U.S. at 101 n. 11. (quoting Larson, 337 U.S. at 690).

III. THIS COURT SHOULD UPHOLD THE FOURTH CIRCUIT'S APPLICATION OF THE *ROOKER-FELDMAN* DOCTRINE.

The *Rooker-Feldman* doctrine stems from two Supreme Court cases decided sixty years apart. In *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923), the Supreme Court held that lower federal courts lack jurisdiction to entertain appeals from state court judgments because that power is reserved to the Supreme Court. In 1983, the Supreme Court decided *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983), clarifying *Rooker* and giving the *Rooker-Feldman* doctrine its name. In *Feldman,* the

Supreme Court held that lower federal courts have no jurisdiction to hear "challenges to State court decisions in particular cases arising out of judicial proceedings", *Id.* at 486, or decide questions "inextricably intertwined" with State court judgments. *Id.* at 483 n. 16.

The *Rooker-Feldman* doctrine is founded on two main inferences derived from provisions of Title 28 of the United States Code. The first inference is that 28 U.S.C. §1257, which gives the Supreme Court appellate review of certain State court decisions, is the only federal statute that explicitly provides for federal review of State court decisions. Congress granted original jurisdiction to federal district courts under a variety of statutes, including 28 U.S.C. §§1331 and 1332. Under this statutory scheme, federal district courts are courts of original, not appellate jurisdiction. Thus, by inference, 28 U.S.C. §1257 granted jurisdiction exclusively to the Supreme Court to review final judgments or decrees from the highest court in a state. The second inference is that Congress intended to foreclose all other forms of federal court review of State decisions. Because Congress only gave the Supreme Court the explicit authority to review the decisions of a state court, Congress meant to deny all other federal courts that power.

Thus, the *Rooker-Feldman* doctrine is an extension of the principle that federal courts are courts of limited jurisdiction. Also underlying the *Rooker-Feldman* doctrine is the idea of federalism. The doctrine is designed to preserve the two distinct legal systems so that each may proceed independently of the other with the Supreme Court as the final arbiter of any federal questions raised in either system. The policy reasons which underlies the doctrine apply just as readily to state agency decisions rendered in quasi-judicial proceedings as they do to State court decisions.

As noted earlier, the *Feldman* Court found that the federal district court was "without authority to review final determinations of the [D.C. Court] in judicial proceedings. Review of such determinations can be obtained only in this Court. *See*, 28 U.S.C. §1257." *Feldman,* 460 U.S. at 476. In reaching this conclusion, the Supreme Court analyzed the crucial question whether the proceedings before the D.C. Court "were judicial in nature" so as to bring these proceedings under the ambit of *Rooker*.

Interestingly, the leading case relied upon by the *Feldman* Court was *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908), where the Supreme Court acknowledge that the Virginia State Corporation Commission is, at least for some purposes, a court. 211 U.S. at 224. *Prentis* also held that:

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist . . . . Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.

211 U.S. at 226. The *Feldman* Court agreed with the *Prentis* finding that the question regarding whether a proceeding is judicial in nature "depends not upon the character of the body but upon the character of the proceedings." 460 U.S. at 477. The *Feldman* Court found that the proceedings at issue were judicial in nature because the tribunal "was called upon to **investigate, declare and enforce** liabilities as they stood on present or past facts and under laws supposed already to

exist." *Feldman*, 460 U.S. at 479. (emphasis added) Consequently, the *Feldman* Court ruled that the district court lacked subject matter jurisdiction over applicants' claims for individual relief.

This Court has recognized that it is "within the power of the States, as it is within the power of the Federal Government, to transfer some adjudicatory functions to administrative agencies, with the opportunity for subsequent judicial review." *Printz v. United States,* 521 U.S. 898, 929 n.14 (1997) (citing *Crowell v. Benson*, 285 U.S. 22 (1932)) Similarly, as noted above, this Court has established that an administrative agency engaged in adjudication is performing a judicial act. *See, Prentis v. Atlantic Coast Line Co.,* 211 U.S. at 224-26. The proposition that State agencies perform judicial acts was the very premise of *FERC v. Mississippi,* 456 U.S. 742, 760-61 (1982), which held that *Testa v. Katt,* 330 U.S. 386 (1947), requires a State administrative agency to apply federal law when it adjudicates disputes arising within its jurisdiction. *See*, 456 U.S. at 760.[27]

The MDPSC clearly functions as a Court in some circumstances. The Maryland Commission has the powers of a court of record to administer oaths, compel the attendance of witnesses and production of documents and enforce compliance with its orders through fines and other penalties as prescribed or authorized by law. *PUC* §§3-104, 3-109, 3-110, 3-111, 10-402. Finally, like other Courts, the Maryland Commission must afford all parties reasonable notice of proceedings, an opportunity to be heard, and the opportunity to present evidence. *PUC* §§3-102, 3-103, 3-107.

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[27] *See, also, Printz,* 521 U.S. at 929 n. 14. ("We have no doubt that *FERC* would not have been decided the way it was if *non* adjudicative responsibilities of the state agency were at issue").

The Maryland Commission, a State administrative agency with longstanding expertise in the regulation of local telephone service, exercised the judicial power granted it under Maryland law when it adjudicated Verizon's Request for a Declaratory Order. The proceeding which resulted in the MDPSC Order at issue was, in every sense, an exercise of judicial power. It commenced when Verizon filed a request for declaratory order, included a prehearing conference, intervention and participation by fifteen parties and a full hearing. The proceeding culminated with the Maryland Commission's adjudication of the rights of the parties under pre-existing interconnection agreements and in arbitrations currently before the MDPSC.

In the proceedings before the Maryland Commission, the Maryland Commission investigated facts, conducted an adversarial hearing, declared its conclusions and enforced liabilities against a specific party as they stood on present facts and under laws that already existed. Given the general principles discussed above, the Maryland Commission must be found to have acted in a judicial capacity. See, e.g. *Ohio Civil Rights Comm'n v. Dayton Christian Schools,* 477 U.S. 619 (1986) (state civil rights commission proceedings deemed "judicial" in nature.)

Petitioners' reliance on *City of Chicago v. International College of Surgeons,* 522 U.S. 156 (1997) is misplaced. Contrary to the United States' assertion, this Court did not find that general statutory language is sufficient to confer jurisdiction over suits challenging the decisions of a State agency as contrary to federal law. *City of Chicago* merely held that federal district courts can exercise supplemental jurisdiction over State claims that call for deferential on-the record review of a State administrative order when the court already possesses original jurisdiction over another claim. In *City of Chicago,* the district court

exercised original jurisdiction over the federal constitutional claims, which were not bound by the administrative record. 118 SCt. at 531.

The Rooker-Feldman doctrine advances the policy of preserving the autonomy of both sovereigns and preventing undue incursions of one upon the other. In applying the *Rooker-Feldman* doctrine, the Fourth Circuit recognized the judicial nature of the proceedings involved and properly found that the concept of federalism inherent in our system requires the federal district court to refrain from taking jurisdiction over this case.

CONCLUSION

For the reasons set forth above, the decision of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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FOR ARGUMENT,

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Nos. 00-1531 and 00-1711

In the Supreme Court of the United States

VERIZON MARYLAND INC., PETITIONER

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

Respondent Public Service Commission of Maryland, et al. (MPSC) does not seriously dispute that Verizon's claims in this case "aris[e] under the * * * laws * * * of the United States" within the meaning of 28 U.S.C. 1331. See MPSC Br. 12 & n.11. Nor can that fact be disputed. The underlying complaint asserts that MPSC construed and enforced Verizon's interconnection agreement with WorldCom in a manner prohibited by the Telecommunications Act of 1996 (1996 Act) and the

FCC's orders pursuant to the 1996 Act. Verizon Pet. App. 7a. It is well settled that "[a] plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute, which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." *Shaw* v. *Delta Air Lines*, 463 U.S. 85, 96 n.14 (1983).

MPSC offers only a cursory defense (Br. 15) of the court of appeals' principal rationale for rejecting Verizon's invocation of the district court's jurisdiction under 28 U.S.C. 1331—namely, that 47 U.S.C. 252(e)(6), which expressly recognizes the district courts' jurisdiction to review state commission "determinations" under the 1996 Act, deprives the district courts, by negative implication, of jurisdiction to review any state commission "determinations" that may be outside its scope.[1] As previously explained, however, nothing in Section 252(e)(6) states, or even suggests, any limitation on the jurisdiction that the district courts otherwise possess under Section 1331 with respect to claims arising under federal law. See U.S. Opening Br. 21-24. Although MPSC also attempts (Br. 42-47) to sustain the court of appeals' rejection of Section 1331 jurisdiction based on the *Rooker-Feldman* doctrine, that doctrine applies only to challenges to the decisions of state courts, and thus has no application to decisions of state regulatory commissions. See U.S. Opening Br. 25-26.

MPSC devotes most of its brief to questions that are not before the Court in this case. The Court granted certiorari solely on the question "[w]hether a federal district court has subject-matter jurisdiction under

[1] All citations of provisions of the 1996 Act are of Supp. V 1999.

28 U.S.C. 1331 to determine whether a state commission's action interpreting or enforcing an interconnection agreement violates the 1996 Act." U.S. Pet. (I); see also Verizon Pet. (I). That question is analytically distinct from the questions whether a carrier has a private right of action to challenge state commission orders that violate the 1996 Act (see MPSC Br. 11-25) or whether a state commission or its commissioners may be named as defendants in such an action, consistent with principles of sovereign immunity, even if the action may proceed against other parties (see MPSC Br. 26-42). As for the first of those questions, it has long been understood that a party has a federal cause of action for declaratory and injunctive relief against state officials who are alleged to have exercised their authority in a manner contrary to controlling federal law. See pp. 8-9, *infra*. As for the sovereign immunity question, the Court granted certiorari on that question in *Mathias* v. *Worldcom Technologies, Inc.*, No. 00-878, and the United States has addressed the question in that case. See U.S. Br. at 29-49, *Mathias*, *supra*.

I. MPSC CONFLATES THE QUESTION WHETHER SUBJECT-MATTER JURISDICTION EXISTS UNDER 28 U.S.C. 1331 WITH THE QUESTION WHETHER A PRIVATE RIGHT OF ACTION EXISTS TO ENFORCE THE 1996 ACT

A. MPSC initially contends that "the 1996 Act does not create a private cause of action." MPSC Br. 11 (capitalization omitted). That contention, which is addressed on its merits below (pp. 8-10), is irrelevant to whether district courts possess subject-matter jurisdiction under 28 U.S.C. 1331 to adjudicate cases such as this one. "It is firmly established in [the Court's] cases that the absence of a valid (as opposed to arguable)

cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998); see also, *e.g.*, *Air Courier Conference of Am.* v. *American Postal Workers Union*, 498 U.S. 517, 523 n.3 (1991) ("[w]hether a cause of action exists is not a question of jurisdiction"); *Burks* v. *Lasker*, 441 U.S. 471, 476 n.5 (1979). Accordingly, the Court need not be detained by MPSC's extended discussion (Br. 11-25) of whether Congress expressly or implicitly provided carriers with a private cause of action to enforce the 1996 Act.

MPSC's error in conflating the separate questions of whether subject-matter jurisdiction exists (the question on which the Court granted certiorari) and whether a private cause of action exists (a question not previously addressed in this case) infects much of its brief. For example, MPSC devotes fully six pages (Br. 13-18) to a discussion of whether a carrier's claim that a state commission has construed or enforced an interconnection agreement in a manner contrary to federal law satisfies the test announced in *Cort* v. *Ash*, 422 U.S. 66 (1975). But *Cort* v. *Ash* and its progeny concern whether a private right of action may be inferred from a federal statute or constitutional provision that does not expressly provide one. Those cases have nothing to do with a district court's jurisdiction, expressly granted by 28 U.S.C. 1331, to decide cases arising under federal law.

MPSC's error is also evident in its discussion (Br. 20-22) of *Jackson Transit Authority* v. *Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15 (1982). In that case, a union brought suit in federal district court against a city and a private transit company. The union claimed that the defendants had violated Section

13(c) of the Urban Mass Transportation Act of 1964 (UMTA), 49 U.S.C. App. 1609(c) (1982), which required that transit workers' collective-bargaining rights be protected when a state or local government received federal funds to acquire a transit company. The district court held that it lacked subject-matter jurisdiction over the case. The Sixth Circuit reversed, holding, first, that there was "subject-matter jurisdiction under 28 U.S.C. § 1331, because the union's claim arose under the laws of the United States," and, second, that the union stated a cause of action under UMTA. *Jackson Transit*, 457 U.S. at 19. This Court "agree[d] with the Court of Appeals that, strictly speaking, the District Court had jurisdiction under 28 U.S.C. § 1331 to hear the union's suit," because "[t]he complaint alleged a violation of the § 13(c) agreement required by the UMTA and of the subsequent collective-bargaining agreement contemplated by the Act, and prayed for relief under federal law." *Id.* at 21 n.6. The Court went on to hold, however, that the union's contract action was not a federal cause of action. *Id.* at 21-29. *Jackson Transit* thus confirms that the jurisdictional question is separate from, and antecedent to, the question whether a federal cause of action exists. MPSC seeks (Br. 21) to dismiss *Jackson Transit* as "merely" involving the district court's "jurisdiction to determine whether the union had a cause of action." But that is precisely what subject-matter jurisdiction is.

B. MPSC mistakenly characterizes (Br. 23) as "unprecedented" and "novel" the proposition that "under § 1331 federal district courts can hear virtually any claim unless Congress has expressly barred the court from hearing that claim." With respect to claims arising under federal law (which are the only claims that Verizon has asserted in this case), that proposition is

confirmed by decades of precedent of this Court and the lower federal courts. This Court has consistently understood Congress to have meant what it said in 28 U.S.C. 1331 when it vested the district courts with jurisdiction over "all civil actions arising under the * * * laws * * * of the United States" (subject in earlier times to a monetary floor). See, *e.g.*, *Powell* v. *McCormack*, 395 U.S. 486, 515 (1969) ("[I]t has generally been recognized that the intent of the drafters [of Section 1331] was to provide a broad jurisdictional grant to the federal courts."); *Bankers Trust Co.* v. *Texas & Pac. Ry.*, 241 U.S. 295, 305 (1916) (describing the statutory predecessor to Section 1331 as a "broad[] exercise[]" of Congress's constitutional authority to prescribe the jurisdiction of the lower federal courts). It would be contrary to the expansive text of Section 1331—as well as to the purpose that it reflects of presumptively providing a federal forum for any cause of action arising under federal law—if courts were to recognize exceptions that Congress has not provided expressly or by the clearest implication. See, *e.g.*, *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 491-494 (1991); cf. *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

No such exception can be derived from 47 U.S.C. 252(e)(6), which states that "any party aggrieved by" a state commission's determination under Section 252 "may bring an action in an appropriate Federal district court to determine whether the agreement * * * meets the requirements of section[s] 251 [and 252]." See U.S. Opening Br. 21-22. Section 252(e)(6) is most sensibly understood as confirming the district courts' jurisdiction to consider all claims that a state commission has acted contrary to Sections 251 and 252 (and the FCC's implementing rules) with respect to an interconnection agreement, whether the claim arises when the state commission approves or rejects the agreement or subsequently when the commission resolves a dispute about its meaning or effect. See U.S. Br. 16-29, *Mathias*, *supra*. In any event, Section 252(e)(6) does not purport to deprive the district courts of any jurisdiction they otherwise possess under Section 1331 with respect to claims arising under federal law. Any possible doubt on that score is resolved by Congress's directive in the 1996 Act that its provisions "shall not be construed to modify, impair, or supersede Federal * * * law unless expressly so provided." Pub. L. No. 104-104, § 601(c)(1), 110 Stat. 143 (*reprinted in* note following 47 U.S.C. 152).[2]

[2] MPSC cites (Br. 20) four district court cases as having "found that jurisdiction is limited to the 1996 Act," and thus presumably cannot be based on other jurisdictional grants such as 28 U.S.C. 1331. None of those cases even suggests, much less holds, that a district court lacks jurisdiction under 28 U.S.C. 1331 (or, for that matter, 47 U.S.C. 252(e)(6)) in the circumstances of this case. One case holds, contrary to MPSC's position, that 47 U.S.C. 252(e)(6) confers jurisdiction on the district courts to decide issues of federal law that arise in the interpretation of previously approved interconnection agreements. *Michigan Bell Tel. Co.* v. *MFS Intelenet of Mich., Inc.*, 16 F. Supp. 2d 817, 823-824 (W.D. Mich. 1998). The court therefore concluded that "it need not determine whether Section 1331 also supports federal jurisdiction." *Id.* at 824. Another of the cases cited by MPSC does not address jurisdiction at all, but instead addresses whether a private right of action exists under 47 U.S.C. 254, a provision of the 1996 Act that is not at issue in this case (or in *Mathias*). *Utility Reform Network* v. *California Pub. Utils. Comm'n*, 26 F. Supp. 2d 1208 (N.D. Cal. 1997). The two remaining cases simply hold that a district court does not have jurisdiction under 47 U.S.C. 252(e)(6) to address matters that have not yet been decided by the state commission.

C. Although the question is not presented in this case, a carrier has a federal cause of action for declaratory and injunctive relief against the enforcement of a state commission order that violates the 1996 Act. See *AT&T* v. *Iowa Utils Bd.*, 525 U.S. 366, 379 n.6 (1999) (observing that the 1996 Act leaves "no doubt" that "if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel").

First, the carrier may be viewed as asserting a claim for equitable relief under the Supremacy Clause and the federal jurisdictional statutes on the ground that an Act of Congress preempts a state regulatory action. The district courts routinely adjudicate such claims without requiring a specific statutory right of action, and this Court has reviewed such claims on the merits. See, *e.g.*, *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 371 (2000) (claim that state statute "unconstitutionally infringed the federal foreign affairs power, violated the Foreign Commerce Clause, and was preempted by [a] federal Act"); *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 380-381 (1992) (claim that state regulation was preempted by federal statute); *Shaw* v. *Delta Air Lines*, 463 U.S. at 96 n.14 (1983) (noting that "[t]his Court, of course, frequently has resolved pre-emption disputes" in this posture); *Ex parte Young*, 209 U.S. 123 (1908); see also, *e.g.*, *Guaranty Nat'l Ins. Co.* v. *Gates*, 916 F.2d 508, 512 (9th Cir. 1990) ("the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution

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Indiana Bell Tel. Co. v. *McCarty*, 30 F.Supp.2d 1100, 1103-1104 (S.D. Ind. 1998); *GTE N.W., Inc.* v. *Nelson*, 969 F. Supp. 654 (W.D. Wash. 1997).

or laws") (quoting 13B Charles A. Wright, et al., *Federal Practice and Procedure* § 3566, 102 (1984)); *Western Air Lines, Inc.* v. *Port Auth.*, 817 F.2d 222, 225-226 (2d Cir. 1987). Several Members of the Court have expressly addressed the existence of such a cause of action. See, *e.g.*, *Golden State Transit Corp.* v. *City of L.A.*, 493 U.S. 103, 119 (1989) (Kennedy, J., dissenting, joined by Rehnquist, C.J., and O'Connor, J.) (a plaintiff may vindicate a federal preemption claim "by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes," regardless of whether the plaintiff "can show the deprivation of a right, privilege, or immunity secured by federal law" that would entitle him to other relief) (citing 28 U.S.C. 1331, 2201, 2202).

Alternatively, a carrier could be viewed as having a private right of action under either the 1996 Act, or under 42 U.S.C. 1983 (as to state defendants) and 47 U.S.C. 207 (as to carrier defendants), to seek declaratory and injunctive relief from a state commission order that violates the 1996 Act. See *Suter* v. *Artist M.*, 503 U.S. 347, 355-356 (1992) (Section 1983 inquiry turns on whether a statute "create[s] enforceable rights" and does not "foreclose [their] enforcement" under Section 1983); *id.* at 363-364 (implied right of action inquiry turns on "whether Congress intended to create the private remedy sought by the plaintiffs"); see also *Blessing* v. *Freestone*, 520 U.S. 329, 346 (1997) (noting that burden falls on state defendant to "make the difficult showing that allowing § 1983 actions to go forward * * * 'would be inconsistent with Congress' carefully tailored scheme'"). Section 251 of the 1996 Act imposes reciprocal duties, and thus confers reciprocal rights, on carriers as parties to interconnection agreements. See 47 U.S.C. 251(a)-(b) (prescribing

"duties" of "[e]ach telecommunications carrier" and "[e]ach local exchange carrier"); 47 U.S.C. 251(c) (prescribing additional "duties" of "each incumbent local exchange carrier"). Section 252 provides for those duties and rights to be enforced in the first instance by a state commission or, if it elects not to exercise that authority, by the FCC. See 47 U.S.C. 252(a)-(e). Congress plainly intended for those duties and rights ultimately to be enforceable in federal court. Indeed, Section 252(e)(6) expressly provides that "any party aggrieved by [a] determination" of a state commission under Section 252 "may bring an action in an appropriate Federal district court." 47 U.S.C. 252(e)(6). And, whether or not the Court construes Section 252(e)(6) in *Mathias* as directly encompassing district court review of orders enforcing existing interconnection agreements, Section 252(e)(6) does not evince any affirmative congressional intent to foreclose such review.[3]

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[3] In arguing to the contrary, MPSC notes (Br. 16) that an earlier version of the 1996 Act expressly provided a private right of action. That provision, contained in Section 257(c) of the original Senate bill, would have made a cause of action *for damages* available to "any person who is injured in its business or property by violations" of the local-competition requirements or an interconnection agreement. S. Rep. No. 23, 104th Cong., 1st Sess. 105 (1995). Such a right of action would have been considerably more expansive than the right of action addressed in the text here. Accordingly, even if the omission of Section 257(c) could be viewed as an expression of congressional disapproval of the particular cause of action for damages that it would have provided, it could not be viewed as an expression of congressional disapproval of the cause of action for declaratory and injunctive relief asserted by Verizon in this case.

II. MPSC CONFLATES THE QUESTION OF SUBJECT-MATTER JURISDICTION UNDER 28 U.S.C. 1331 WITH THE QUESTION OF SOVEREIGN IMMUNITY

MPSC next contends that "the Eleventh Amendment mandates that this case be dismissed," either because MPSC "has not waived its sovereign immunity" or because "this proceeding does not meet the requirements of the *Ex parte Young* exception." MPSC Br. 26, 36 (capitalization omitted). No question of sovereign immunity, however, is before the Court in this case.

The court of appeals addressed the question of subject-matter jurisdiction under 28 U.S.C. 1331 separately from the question of sovereign immunity. Compare Verizon Pet. App. 47a-50a (discussing jurisdiction under Section 1331) with *id.* at 8a-30a (discussing sovereign immunity). As the court of appeals recognized (*id.* at 29a- 30a), the Section 1331 question concerns whether district courts may exercise jurisdiction over claims that a state commission order construing an interconnection agreement violates the 1996 Act, even if the plaintiff names as defendants only the other parties to an agreement, and not the state commission or commissioners.

The petitions for certiorari filed by the United States and Verizon sought the Court's review on four questions, two of which challenged the court of appeals' rulings on subject-matter jurisdiction and two of which challenged its rulings on sovereign immunity. See U.S. Pet (I) (questions presented); Verizon Pet. (I) (questions presented). The Court granted certiorari only on the question of subject-matter jurisdiction under Section 1331. The Court had already granted certiorari on the same sovereign immunity questions in the

Mathias case, and the United States has addressed those questions in that case. See U.S. Br. at 29-49, *Mathias*, *supra*.[4]

III. THE ROOKER-FELDMAN DOCTRINE DOES NOT BAR SUBJECT-MATTER JURISDICTION OVER THIS CASE

MPSC finally contends (Br. 42-47) that the *Rooker-Feldman* doctrine precludes a district court from exercising jurisdiction over a suit challenging the decision of a state commission under the 1996 Act. See *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983). As previously explained, the *Rooker-Feldman* doctrine has no application to this case. See U.S. Opening Br. 25-26. That doctrine is designed to prevent litigants from circumventing 28 U.S.C. 1257, which provides for review in this Court of decisions of the highest state court, by seeking review of such decisions in the lower federal courts. No circumvention of 28 U.S.C. 1257 occurs where, as here, the underlying dispute has not been presented to the state courts. Nor is it relevant for present purposes that MPSC might be viewed as having acted in a "quasi-judicial" capacity in this case. Such an inquiry is conducted under the *Rooker-Feldman* doctrine only in assessing whether

[4] Since the filing of the United States' brief in *Mathias*, those questions have been addressed by another court of appeals. See *MCI Telecomms. Corp.* v. *Bell Atl.-Pa.*, No. 00-2257, 2001 WL 1381590 (3d Cir. Nov. 2, 2001). The Third Circuit, consistent with all of the courts of appeals that have addressed those questions with the exception of the Fourth Circuit, held that the Eleventh Amendment does not bar suits against state commissions or their commissioners seeking review of their orders for compliance with the 1996 Act.

the act of the highest state court is a judicial act, and thus one that could be reviewed in this Court, as opposed to a legislative, administrative, or ministerial act. See, *e.g.*, *Feldman*, 460 U.S. at 476-482. It is not conducted to determine whether a regulatory entity, which plainly is *not* a state court, should be treated as one for purposes of 28 U.S.C. 1257.[5]

Moreover, Congress has expressly made at least some decisions of state commissions under Sections 251 and 252 reviewable in district court. 47 U.S.C. 252(e)(6). Indeed, Congress has made the district courts the exclusive forum for seeking review of state commission decisions approving or rejecting interconnection agreements as an initial matter. See 47 U.S.C. 252(e)(4). Congress thus should be presumed to have concluded that such review may occur consistently with 28 U.S.C. 1257. MPSC offers no reason to surmise that district court review does not offend the *Rooker-Feldman* doctrine when the state commission order concerns a new interconnection agreement—a circumstance in which MPSC concedes (Br. 15) Congress provided for such review—but somehow does offend the *Rooker-Feldman* doctrine when the state commission order concerns a previously approved agreement.

[5] Similarly, the Anti-Injunction Act, 28 U.S.C. 2283. which prohibits district courts (with certain exceptions) from "grant[ing] an injunction to stay proceedings in a State court," has been recognized not to apply to state regulatory commissions. See, *e.g.*, *Entergy, Arkansas, Inc.* v. *Nebraska*, 210 F.3d 887, 900-901 (8th Cir. 2000) (noting that "every circuit to have addressed the question [whether 28 U.S.C. 2283 applies to state administrative proceedings] has held that it does not") (citing cases); *Bud Antle, Inc.* v. *Barbosa*, 45 F.3d 1261, 1271 (9th Cir.) (citing cases), cert. denied, 515 U.S. 1159 (1995); cf. *Gibson* v. *Berryhill*, 411 U.S. 564, 573 n.12 (1973) (declining to address the question).

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case should be remanded for further proceedings, which may, if appropriate, include further consideration in light of the Court's decision in *Mathias* v. *Worldcom Technologies, Inc.*, No. 00-878.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

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IN THE

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF OF RESPONDENTS MCI WORLDCOM, INC. AND MCIMETRO ACCESS TRANSMISSION SERVICES LLC IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

Nos. 00-1531 and 00-1711

VERIZON MARYLAND INC., and
UNITED STATES OF AMERICA,
Petitioners,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF OF RESPONDENTS MCI WORLDCOM, INC. AND MCIMETRO ACCESS TRANSMISSION SERVICES LLC

Respondents MCI WORLDCOM, Inc., and MCImetro Access Transmission Services LLC (collectively "WorldCom") demonstrated in their opening brief and in WorldCom's brief in the companion case, *Mathias v. WorldCom Technologies, Inc.*, No. 00-878 (U.S. filed September 10, 2001), that federal courts have jurisdiction under 28 U.S.C. § 1331 to consider whether a state public utility commission has violated federal law in interpreting or enforcing an interconnection agreement entered into pursuant to the Telecommunications Act of 1996 (the "1996 Act" or "Act"). The arguments in response by the Public Service Commission of Maryland ("MPSC") and *amici curiae* the

Virginia State Corporation Commission ("VSCC") and the Illinois Commerce Commission ("ICC") are without merit.

Bedrock principles of federal jurisdiction confirm that federal courts may adjudicate claims that state commission decisions interpreting and enforcing interconnection agreements violate the 1996 Act or applicable FCC regulations. The state commissions' arguments against the existence of a private right of action are off-point for two reasons: (1) they confuse the jurisdictional inquiry with the existence of a right of action, and (2) they incorrectly assume that a right to sue under section 1331 to enforce the 1996 Act could only be created by the Act itself.

On the other hand, Verizon goes too far – and well beyond the scope of the Court's grant of review – in contending that "Any Claim Based on a 1996 Act Interconnection Agreement Arises Under Federal Law." Verizon Br. at 20; *see id.* at 12. The Court should not accept Verizon's invitation to address the merits of its claim that a misinterpretation of an interconnection agreement by a state commission necessarily violates the 1996 Act. The sole question presented in this case is whether there is federal jurisdiction to entertain a claim that a state commission's enforcement decision violated the Act, not the merits question whether Verizon actually articulated a valid federal claim. But if the Court chooses to reach Verizon's additional arguments about the *scope* of federal jurisdiction in enforcement cases, it should reject them.

I. Federal Courts Have Jurisdiction to Address Claims that State Commission Determinations Violate Federal Law.

The MPSC and its supporting *amici* do not even attempt to counter the fundamental premise of WorldCom's jurisdictional argument: that federal question jurisdiction exists over Verizon's claims because "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (quoting *Bell v. Hood*, 327 U.S. 678, 685 (1946)); WorldCom Br. at 16-22. Instead, they argue that federal question jurisdiction does not exist under section 1331 because the 1996 Act does not create a private right of action, either express or implied, for challenges to state commission enforcement orders. That approach is faulty for two reasons.

First, whether courts have subject matter jurisdiction – the only question presented here – is a threshold question separate from and antecedent to the question whether the plaintiff has a cause of action. *Steel Co.*, 523 U.S. at 89; *Jackson Transit Auth. v. Local Division 1285, Amalgamated Transit Union, AFL-CIO-CLC*, 457 U.S. 15, 21 n.6 (1982). Here, to the extent that Verizon asserted non-frivolous claims to relief predicated on a specific interpretation of federal law, federal question jurisdiction exists under section 1331.

Second, as to the right of action issue, the MPSC incorrectly presumes that any right of action must be created

by the 1996 Act itself.[1] That is not the case. A carrier seeking injunctive relief on the ground that a state commission order is inconsistent with federal law has a private right of action both directly under the Supremacy Clause of the United States Constitution and under 42 U.S.C. § 1983. There is thus no reason to invoke "implied right of action" case law in this context. Moreover, even if *federal* law did not provide a clear right to seek judicial relief to bring state officials into compliance with federal law, state law would resolve any right of action issue in this context. As the MPSC acknowledges, MPSC Br. at 24, state administrative review procedures give carriers a right of action to challenge state commission orders enforcing interconnection agreements in state court. When the claims at issue are predicated on federal law, that same state-law-based review action may be brought to federal court under section 1331. *See City of Chicago v. International College of Surgeons*, 522 U.S. 156, 163-64 (1997); *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 8-10 (1983).

[1] In its *Mathias* brief, WorldCom has shown that section 252(e)(6) of the Act grants jurisdiction and provides an express right of action for federal court review of a state commission determination enforcing an interconnection agreement. Br. of WorldCom at 22-28, *Mathias v. WorldCom Techs., Inc.*, No. 00-878. WorldCom has also shown, however, that resolution of the section 252(e)(6) question in *Mathias* is not necessary to determine whether jurisdiction exists under section 1331. *Id.* at 15-22. Thus, because the question presented here does not directly implicate section 252(e)(6), WorldCom will assume, for purposes of this reply brief, that section 252(e)(6) does not apply. Nevertheless, if the Court reaches the section 252(e)(6) issue in *Mathias* and concludes that it provides a cause of action in enforcement cases, the present discussion of private rights of action would be unnecessary.

A. The MPSC's Argument Inverts the Jurisdictional Inquiry.

The thrust of the MPSC's argument is that federal courts must *first* determine whether the plaintiff's complaint states a cognizable federal cause of action and *then* discern whether federal question jurisdiction exists. MPSC Br. at 11-22. That formulation has it backwards. Subject matter jurisdiction is a "threshold matter" which courts must address before determining whether the plaintiff has a valid cause of action. *Steel Co.*, 523 U.S. at 94-95; *id* at 89-90 ("jurisdiction is not defeated by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover"); *Jackson Transit*, 457 U.S. at 21 n.6 (where complaint claims violation of federal law, courts have subject matter jurisdiction to determine whether cause of action exists under that federal law).

In undertaking that threshold inquiry, the court "must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States." *Bell v. Hood*, 327 U.S. 678, 681 (1946). Stated somewhat more precisely, "the district court has jurisdiction if 'the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another.'" *Steel Co.*, 523 U.S. at 89 (quoting *Bell v. Hood*, 327 U.S. at 685); *see generally* WorldCom Br., Nos. 00-1531, 00-1711, at 16-19.

Under that standard, the federal district court had jurisdiction to entertain Verizon's complaint, which expressly alleged that both the 1996 Act and the FCC's implementing regulations insulated Verizon from having to

pay reciprocal compensation for calls to Internet Service Providers ("ISPs"). Compl. ¶¶ 3, 4, 5, 25, 31-32, 35. Clearly, Verizon raised meritorious claims if and only if the 1996 Act and the FCC regulations were given the construction it proposed. That is all that is required to invoke section 1331.[2]

B. Carriers Have a Private Right of Action to Challenge State Commission Enforcement Orders Under the Supremacy Clause, Section 1983, and State Law.

Carriers asserting claims like those of Verizon do have a right of action in federal court, derived from both federal and state law.

1. The Supremacy Clause

Verizon's complaint asserts a straightforward claim of preemption actionable under the Supremacy Clause of the United States Constitution, U.S. Const., art. VI, cl. 2. This

[2] This is not to say that Verizon's claims were actually meritorious. In its effort to counter the MPSC's conclusion that Verizon had validly agreed to pay compensation for ISP calls, Verizon relied on FCC regulations limiting reciprocal compensation to "local traffic" and on an FCC ruling that ISP calls are not "local traffic." As Verizon acknowledges, however, that FCC ruling was later vacated by the D.C. Circuit. *See Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). On remand, the FCC dropped its use of the term "local traffic" as the touchstone for determining whether calls are subject to reciprocal compensation, adopting an entirely different statutory analysis based on 47 U.S.C. § 251(g). *See In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 F.C.C.R. 9151 (2001). That new ruling, which does not purport to interfere retroactively with interconnection agreements containing promises to pay reciprocal compensation for ISP calls (like the promise the MPSC found to exist here), is being challenged in the D.C. Circuit.

Court has never required that such preemption claims be expressly authorized by an act of Congress. Rather, preemption claims are actionable directly under the Supremacy Clause and do not require a separate statutory cause of action under the federal law at issue. *See, e.g., Crosby v. National Foreign Trade Council*, 530 U.S. 363, 387-88 (2000); *Brown v. Hotel and Restaurant Employees and Bartenders Int'l Union Local 54*, 468 U.S. 491, 501-02 (1984). *Accord, Western Air Lines, Inc. v. Port Auth. of N.Y. and N.J.*, 817 F.2d 222, 225-26 (2d Cir. 1987) (citing *White Mountain Apache Tribe v. Williams*, 810 F.3d 844, 847 (9th Cir. 1987)). In *Crosby*, for example, the Court sustained a preemption action directly under the Supremacy Clause where a state statute was inconsistent with the provisions of a federal appropriations act that delegated certain rights and duties to the President – a statute that clearly did not create any private right of action itself. 530 U.S. at 387-88. Thus, regardless of whether the 1996 Act creates a private right of action, Verizon has a right of action under the Supremacy Clause to seek declaratory and injunctive relief against state commission orders that Verizon claims were contrary to, or preempted by, federal law.

Although the MPSC contends that a right of action arises only if a federal statute totally precludes state regulation of the matter being litigated, MPSC Br. at 19, that is not the law. Preemption can and does occur where Congress has allowed some state regulation while enacting particular requirements that states are obligated to respect. That kind of "conflict" preemption is treated no differently than "field" preemption. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). The *scope* of Congress's preemption of state regulation cannot logically affect a party's right to ask the federal courts for redress when states

enact regulations barred by federal law.[3] Put differently, the fact that states were authorized to do some things in a given area should not affect the remedies available when they do something else that is prohibited. As this Court has explained, "[a] plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) (citing cases).

2. Section 1983

Even without regard to the Supremacy Clause, Verizon has a private right of action for declaratory and injunctive relief under 42 U.S.C. § 1983. Section 1983 provides a plaintiff with a private right of action against any person who, under color of state law, deprives the plaintiff of a right, privilege or immunity secured by the Constitution or federal statutes. *See Blessing v. Freestone*, 520 U.S. 329, 340 (1997). It is a "generally and presumptively available federal remedy" for claimed violations of federal rights by state officials. *Livadas v. Bradshaw*, 512 U.S. 107, 133 (1994). To prevail on a claim under section 1983, the asserted federal right must meet certain criteria: (1) Congress must have intended that the provision in question benefit the plaintiff; (2) the right created by the statute must not be so vague and amorphous that its

[3] The MPSC does cite one district court decision drawing this distinction – *Utility Reform Network v. California Public Utilities Commission*, 26 F. Supp. 2d 1208, 1213 (N.D. Cal. 1998), cited in MPSC Br. at 19-20. But the authorities cited by that court – principally the *Western Air Lines* decision of the Second Circuit – do not support the distinction.

enforcement would strain judicial competence; and (3) the statute must unambiguously impose a binding obligation on the states. *Blessing*, 520 U.S. at 340-41. If these elements are satisfied, then section 1983 applies except in a rare case where a section 1983 action would be inconsistent with Congress's carefully crafted remedial scheme. *Id.* at 346-47.

Under the *Blessing* test, the provisions of the Act and the FCC regulations that give carriers the right to demand certain terms and conditions in interconnection agreements certainly create federal "rights" that are presumptively enforceable under section 1983.[4] Moreover, no feature of the Act, such as a comprehensive remedial scheme, suggests a congressional intent to bar claims under section 1983. *See GTE North, Inc. v. Strand*, 209 F.3d 909, 916 (6th Cir. 2000) (action challenging state commission order as inconsistent with 1996 Act properly brought under section 1983), *cert. denied*, 531 U.S. 957 (2000). Because Verizon alleged that the MPSC's enforcement decision deprived it of rights guaranteed under the Act and FCC regulations, it could validly invoke section 1983.

3. State law cause of action under Maryland administrative review procedures

Finally, even if *federal* law did not create a private right of action, Verizon has a state law cause of action under Maryland's administrative review act, Md. Code Ann., Pub.

[4] The *Blessing* test should not be construed as requiring a showing of congressional intent comparable to that required in "implied right of action" cases. To do so would render section 1983 superfluous in statutory cases and effectively deny Congress the right to rely on section 1983 in passing new legislation affecting state obligations, without having to signify its intent regarding rights of action in each new piece of legislation.

Utils. Cos. § 3-203 *et seq.*[5] The MPSC does not deny that Verizon's federal claims can be heard in the context of that state law review procedure. It simply contends that Verizon's claims must be heard in state rather than federal court. MPSC Br. at 24; *see* ICC Br. at 7.

That is incorrect. Because the gravamen of Verizon's claims is that the agency violated specific federal rights, it is entitled to invoke its state-created right to administrative review in federal court. This Court has recognized that, even where a plaintiff's right of action is created by state law, the claims arise under the laws of the United States for purposes of section 1331 if the plaintiff's "well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law." *International College of Surgeons*, 522 U.S. at 164 (quoting *Franchise Tax Bd.*, 463 U.S. at 13).

In *International College of Surgeons*, the plaintiff filed an administrative appeal in state court under the Illinois Administrative Review Law to challenge a decision of the Chicago Historical and Architectural Landmarks Commission. *Id.* In addition to various state law claims, the plaintiffs also asserted that the commission's decision violated various rights secured by federal law. When the defendant sought to remove the case to federal court, the question arose whether the action originally could have been brought in federal court under section 1331. The Court

[5] Verizon also has a more circumscribed cause of action against other private carriers under state contract law. As this Court held in *Jackson Transit*, where Congress has required private parties to enter into contracts pursuant to a federal statutory scheme, Congress presumably intended those contracts to be enforceable through a private right of action (though not necessarily involving federal questions, *see infra* pp. 16-17). *See* 457 U.S. at 20-21. Otherwise, Congress's directive that the parties enter into the contract in the first instance would be meaningless.

concluded that the plaintiff's claims alleging that the commission's decision violated the plaintiff's rights under federal law "unquestionably" satisfied the test for jurisdiction under section 1331. *Id.* That same conclusion applies here.[6]

4. *Rooker-Feldman* Does Not Apply Here.

Contrary to the MPSC's contention, the *Rooker-Feldman* doctrine has no application here. *Rooker-Feldman* is derived from 28 U.S.C. § 1257, which gives this Court jurisdiction to hear certain appeals from the highest court of a state. Reading that jurisdictional grant as exclusive, this Court has held that lower federal courts lack jurisdiction over challenges to the decisions of a state's highest court and issues "inextricably intertwined" with the judgment of a state's highest court. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483 n.16 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

[6] The ICC makes the additional argument that Verizon's claims are not civil actions within the federal courts' original jurisdiction because, under the Maryland administrative review scheme, the court would be limited to on-the-record review of the MPSC's decision and would be required to afford deference to the MPSC's determinations. ICC Br. at 19-29. This Court rejected that argument in *International College of Surgeons*, 522 U.S. at 167-68 (claims limited to the administrative record "arise under federal law for purposes of federal question jurisdiction"); *id.* at 171 ("district courts frequently conduct deferential review pursuant to their original jurisdiction over federal questions"). *See also Califano v. Sanders*, 430 U.S. 99, 106-07 & n.7 (1977) (Congress intended section 1331 to grant jurisdiction over review of agency action). Contrary to the ICC's argument, the outcome in *International College of Surgeons* did not turn on the fact that one of the federal claims at issue had not been raised administratively and thus did not warrant deferential review. *International College of Surgeons*, 522 U.S. at 169-71.

This Court has never applied *Rooker-Feldman* to bar review of the determination of a state administrative agency in federal district court. The Court's analysis in *Feldman* is not to the contrary. *See* MPSC Br. at 44-45. There, the Court considered whether a state *court* decision denying an application for waiver of certain requirements to sit for the state bar exam was sufficiently judicial in character to bring it within this Court's exclusive jurisdiction. 460 U.S. at 476-77. Nothing in that analysis suggests that the doctrine should be extended to protect state administrative agencies from federal judicial review. Indeed, this Court has recognized that federal district courts have *original* jurisdiction to review decisions of state administrative agencies. *See International College of Surgeons*, 522 U.S. at 170-71.[7]

II. Verizon's Argument for Creation of Federal Common Law Is Not Encompassed by the Question Presented, Has Been Rejected by the Courts of Appeals, and Is Contrary to the Terms of the Act.

Verizon, like Ameritech in *Mathias*, pushes far beyond the question presented to argue that federal common law governs the interpretation of negotiated provisions in interconnection agreements. Although the incumbent carriers in both cases devote considerable ingenuity to interweaving this argument with others, in reality there is no need for the Court to address the argument in order to answer the questions presented in either case. Indeed, this Court has declined to grant Ameritech's petition challenging the

[7] Applying *Rooker-Feldman* here would also effectively impose a requirement that Verizon exhaust its state judicial remedies before asserting its federal claim to this Court. This Court has held that exhaustion of state remedies is not required under section 1983. *See Edwards v. Balisok*, 520 U.S. 641, 649 (1997). Moreover, requiring exhaustion of state *judicial* remedies would effectively repeal section 1983 as applied to administrative agency cases.

Seventh Circuit's holding that interpretation of interconnection agreements is governed by state contract law. *Illinois Bell Tel. Co. v. WorldCom Techs., Inc.*, No. 00-921. But if the Court nevertheless reaches the issue, it should hold that claims of misinterpretation of interconnection agreements arise under state law.

A. The Issue of the Scope of Federal Claims in Enforcement Cases Is Not Before the Court.

In this case and *Mathias*, the Court reformulated the questions presented to limit argument to what is in essence a single overarching issue: whether federal district courts have the power to adjudicate a claim that a state commission determination interpreting and enforcing an interconnection agreement violates federal law. As demonstrated by WorldCom's briefs in both cases, the answer is yes: statutory jurisdiction over such claims exists under both 28 U.S.C. § 1331 and 47 U.S.C. § 252(e)(6), and the adjudication of such claims is consistent with the Eleventh Amendment.

Moreover, the existence in this case (and *Mathias)* of *bona fide* federal questions can hardly be doubted. Verizon alleged that the state commission's determination requiring reciprocal compensation for calls to ISPs violates a specific FCC order. That asserted violation of a federal regulation plainly arises under federal law.

But that does not mean that federal law governs every claim asserted by Verizon. For example, Verizon alleged that the state commission's determination requiring reciprocal compensation for calls to ISPs violates a negotiated provision of the interconnection agreement between Verizon and WorldCom. Every court of appeals

that has considered *that* issue has held that a commission's alleged misinterpretation of a negotiated interconnection agreement does not constitute a violation of federal law. *See* Br. in Opp. of Resps. WorldCom, *et al.*, at 9-13, *Mathias v. WorldCom Techs., Inc.*, Nos. 00-878, 00-921 (U.S. filed Jan. 16, 2001) (reviewing cases in detail). There is, therefore, no reason for the Court to reach out at this point and address that broader issue.

To the contrary, the Court will fully address the lower courts' need for guidance if it simply answers the questions actually presented and decides whether federal courts may entertain federal-law challenges to state commission enforcement decisions that are not facially insubstantial. There is no reason to go further by deciding on which side of the federal-state divide any specific claim falls. Staking out that dividing line is better left to case-by-case adjudication and percolation in the lower courts. In the unlikely event that a circuit split develops over any agreement-specific issues requiring intervention by this Court, the Court's decision will be aided materially by the lower courts' experience in addressing the myriad possible fact patterns that might arise in this context.

B. Claims of Misinterpretation of Interconnection Agreements Arise Under State Law.

If the Court reaches the issue, it should reject the sweeping argument made by Verizon and Ameritech that federal law governs *every* dispute concerning the interpretation and enforcement of interconnection agreements. *See* Verizon Br. at 20 ("Any Claim Based on a 1996 Act Interconnection Agreement Arises Under Federal Law"). That position not only is extreme, it is flatly

contradicted by Congress's express preservation of the states' authority to impose *state law* requirements when reviewing interconnection agreements. 47 U.S.C. § 252(e)(3); *see also id.* § 251(d)(3) (preserving state interconnection regulations not inconsistent with 1996 Act); *id.* § 261(c) (permitting state commissions to impose additional requirements necessary to further competition consistent with the Act and FCC regulations); *id.* § 152 note (Pub. L. No. 104-104, § 601(c)) (Act not to be construed to supersede state or local law unless expressly so provided). Congress would hardly have preserved state law if it viewed interconnection agreements as governed by federal law alone.

The incumbents' position is also contrary to Congress's decision to allow parties to interconnection agreements to negotiate terms "without regard to" the substantive requirements otherwise imposed by the Act and the FCC's implementing regulations. 47 U.S.C. § 252(a)(1). Since such negotiated provisions are not subject to the specific requirements of the relevant federal statute and regulations, the duties created are essentially contractual in nature. Thus, if federal law were to control the enforcement and interpretation of negotiated agreements, it would have to be a federal common law of contracts. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86-87 (1994) (issue not addressed by federal statute would be governed by federal law only through creation of federal common law).

This Court has made increasingly clear that courts may not create federal common law except in the most "narrow areas." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). A court should contemplate creating federal common law only in "few and restricted" cases "where there is a significant conflict between some federal

policy or interest and the use of state law." *O'Melveny*, 512 U.S. at 87 (internal quotation marks and citations omitted). When dealing with a comprehensive statutory scheme, "matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." *Id.* at 85. Here, especially given Congress's express preservation of state law applicable to interconnection agreements, *see, e.g.*, 47 U.S.C. § 252(e)(3), the incumbents cannot possibly show that applying state law to the interpretation of negotiated interconnection agreements poses "a significant conflict" with federal policies or interests.

The only statutory support identified by the incumbents for their position is the Act's reference to negotiated agreements as "binding." *Id.* § 252(a)(1). That single word in no way signifies a congressional intent to federalize all obligations created in negotiated interconnection agreements. Clearly, Congress intended that those agreements would constitute "binding" contracts. But if it had wanted the courts to create a federal common law governing those binding contracts, it would have said more than that. After all, applying state contract law to interpret and enforce negotiated interconnection agreements fully effectuates their binding character. Congress could hardly have supposed that by using the word "binding" it was establishing some sort of federal policy barring courts from following the usual approach of applying state law to fill in the gaps left in federal legislation.

Nor does Verizon succeed in showing that the creation of federal common law is warranted here under *Jackson Transit* or *Int'l Ass'n of Machinists, AFL-CIO v. Central Airlines, Inc.*, 372 U.S. 682 (1963). In *Jackson Transit*, the Court held that, although federal law required certain parties to enter into collective bargaining agreements and Congress

intended those agreements to be enforceable, *see Jackson Transit*, 457 U.S. at 20-21, the resulting agreements were governed by state law, *id.* at 23-29. *Jackson Transit* thus establishes that federal common law need not govern the interpretation and enforcement of contracts whose existence and binding character is required by federal law.

The Court's earlier decision in *Machinists* is not to the contrary. That case concerned a Railway Labor Act requirement that collective bargaining agreements in the air industry include provisions creating "boards of adjustment" to settle employee grievances. 372 U.S. at 690. Because the federal statute required an agreement to include provisions creating an adjustment board, the interpretation and enforcement of the agreement to comply with that specific statutory requirement was a question of federal law. *Id.* at 690-91. In finding that federal law governed, the Court also observed that labor relations affecting interstate transportation have long been a specifically federal concern under the Railway Labor Act, *see id.* at 686-87, and that the interstate character of the agreements required application of federal law to ensure uniformity, *see id.* at 692 n.15.

Negotiated provisions in interconnection agreements have none of the characteristics that underlay the holding in *Machinists*. Most importantly, *Machinists* held that federal law governed the interpretation of contractual provisions creating boards of adjustment precisely because Congress specifically *required* inclusion of contractual provisions creating such boards. In contrast, section 252(a)(1) of the 1996 Act expressly *exempts* negotiated provisions in interconnection agreements from the Act's substantive requirements. Nor do interconnection agreements implicate labor relations, a field that has been unusually fertile ground for federal common law due to the specific historic context

in which Congress enacted statutes such as the Railway Labor Act to ensure labor peace, *see Machinists*, 372 U.S. at 686-91.

In an attempt to escape the fact that the 1996 Act – unlike the Railway Labor Act – does not impose specific requirements that must be incorporated into negotiated interconnection agreements, the incumbents repeatedly invoke the Fourth Circuit's observation in another context that negotiated interconnection agreements may at times track the substantive requirements of the statute. *See AT&T Communications of the Southern States, Inc. v. BellSouth Telecomms., Inc.*, 229 F.3d 457, 465 (4th Cir. 2000). Whether or not that is true, the parties are free to bargain for quite different terms, trading their rights under the Act for specific provisions of greater value to them. While the substantive requirements of the Act may form a backdrop for such negotiations, Congress could not have been clearer that carriers may enter into negotiated agreements "without regard to" those substantive requirements. 47 U.S.C. § 252(a); *see also id.* § 252(e)(2)(A) (prohibiting state commissions from rejecting negotiated agreements that do not comply with Act's substantive requirements). It follows that the negotiated terms of interconnection agreements are not dictated by federal law as they were in *Machinists*. Certainly the Fourth Circuit implied no such thing in *AT&T Communications*, 229 F.3d at 465, and it emphatically rejected the incumbents' position in the present case, *see* Pet. App. 25a-28a.[8]

[8] The notion that interconnection agreements end up merely mirroring federal law is further belied by the fact that the law in this area is dynamic. Here, for example, Verizon makes much of the fact that the interconnection agreement at issue was similar to the then-existing federal regulations in its limitation of reciprocal compensation to "local traffic." Verizon Br. at 8. But that is no longer the relevant standard under current FCC rules. *See supra* p. 6 n.2.

Finally, there is no merit to the incumbents' attempt to liken interconnection agreements to federal tariffs. Formerly, carriers were required to file tariffs for *interstate* services with the FCC, and such tariffs were governed by federal law to prevent rate discrimination and ensure uniform nationwide treatment. *See American Tel. & Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 222 (1998).[9] But an interconnection agreement is not an interstate tariff requiring uniform treatment nationwide. Rather, an interconnection agreement applies primarily to services *within a single state*. Indeed, Congress specifically provided that states may impose their own requirements in arbitrated agreements. *See, e.g.*, 47 U.S.C. §§ 251(d)(3), 252(e)(3), 261(b)-(c), 152 note (Pub. L. No. 104-104, § 601(c)). Thus, the need for nationwide uniformity in the case of federal interstate tariffs is absent here.[10]

[9] Pursuant to the market-oriented policies of the Act, the FCC has now issued "detariffing" rules that no longer permit carriers to file federal interstate tariffs for long-distance services, *see In re Policy & Rules Concerning the Interstate, Interexchange Marketplace*, 15 F.C.C.R. 22321 (2000), on the ground that tariffing is no longer "necessary to ensure just and reasonable, nondiscriminatory rates, nor necessary for the protection of consumers," *MCI WORLDCOM, Inc. v. FCC*, 209 F.3d 760, 763 (D.C. Cir. 2000). It would be ironic indeed if the 1996 Act extended federal tariff status to intrastate services just as it spelled the demise of the federal tariff doctrine for interstate services.

[10] To the extent interconnection agreements resemble tariffs at all, they are akin to state rather than federal tariffs. Indeed, the "opt-in rights" on which the incumbents place so much emphasis, *see* 47 U.S.C. § 252(i), are only available within a specific state, not nationwide. *E.g., In re Application of GTE Corp.*, 15 F.C.C.R. 14032, ¶ 314 (2000). Similarly, interconnection agreements are filed with state commissions, 47 U.S.C. § 252(h), not the FCC. The incumbents cite no authority for the proposition that federal law governs state tariffs.

In short, there is no basis whatsoever for the incumbents' contention that federal law governs *every* aspect of the interpretation and enforcement of interconnection agreements. The Act makes plain that Congress intended interconnection agreements to be subject to a mixed regime of federal and state law. To be sure, where Congress determined that federal policies require the promulgation of uniform federal standards for interconnection agreements – either through the specific requirements of the Act itself or through the regulations the FCC is authorized to issue – federal law governs. But that does not transform every dispute involving interconnection agreements into a question of federal law. There is thus no basis for disturbing the unanimous determinations of the courts of appeals that some claims pertaining to interconnection agreements are governed by state law. The precise demarcation between state and federal law in this area is best left to case-by-case adjudication in the lower courts confronting the multiplicity of fact patterns in which this question could arise.[11]

CONCLUSION

For the reasons set forth above and in our opening brief, the Court should reverse the Fourth Circuit's decision that the district court lacked general federal question jurisdiction under 28 U.S.C. § 1331.

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[11] As to the MPSC's Eleventh Amendment arguments, WorldCom respectfully refers the Court to its brief in the *Mathias* case. Br. of Resps. WorldCom Techs., Inc., *et al.*, *Mathias v. WorldCom Techs, Inc., et al.*, 00-878, at 33-50 (U.S. filed Sept. 10, 2001). In addition, we note that the Third Circuit recently joined the majority of circuits that have rejected the Eleventh Amendment arguments raised here. *See MCI Telecomms. Corp. v. Bell Atlantic-Pennsylvania*, __ F.3d __, 2001 WL 1381590, No. 00-2257 (3d Cir. Nov. 2, 2001).

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IN THE

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UNITED STATES OF AMERICA,
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On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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IN THE

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On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER VERIZON MARYLAND INC.

Respondent Maryland Public Service Commission ("PSC") defends the Fourth Circuit's § 1331 holding on two grounds. First, it maintains that Verizon has no private right of action under federal law to challenge the PSC's determination. Second, it argues that the Fourth Circuit correctly held that the *Rooker-Feldman* doctrine forecloses federal court review of state administrative adjudications. These arguments reflect a profound misunderstanding of both the Telecommunications Act of 1996 ("1996 Act") and the

principles governing the jurisdiction of the federal courts.[1]

ARGUMENT

I. A STATE COMMISSION DECISION INTERPRETING AN INTERCONNECTION AGREEMENT IS AN EXERCISE OF FEDERAL STATUTORY AUTHORITY THAT IS SUBJECT TO FEDERAL JUDICIAL REVIEW

At the core of its arguments is the PSC's fundamental unwillingness to accept this Court's determination that, "[w]ith regard to the matters addressed by the 1996 Act," Congress "unquestionably" "has taken the regulation of local telecommunications competition away from the States." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999). Though Congress offered states an opportunity to "participat[e] in the administration of the new *federal* regime" (*id.*), it did so with the understanding that, when a state accepts the offer and voluntarily exercises federal regulatory authority, its determinations will be subject to review in a federal district court. As this Court pointedly observed, one thing about which "there is no doubt" is "that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *Id.*

[1] The PSC devotes a substantial portion of its brief to arguing that the PSC and its members are immune from suit in federal court under the Eleventh Amendment. PSC Br. 26-42. Although the petitions for writs of certiorari in these cases presented two Eleventh Amendment questions (waiver and *Ex parte Young*), the Court limited its grant of certiorari to the § 1331 question. Verizon accordingly did not argue the Eleventh Amendment issues in its opening brief, *see* Verizon Br. 30 n.11, and will refrain from responding to the PSC's Eleventh Amendment arguments in this reply brief. The Eleventh Amendment issues are before the Court in *Mathias v. WorldCom Technologies, Inc.*, No. 00-878, and the briefs of the respondents and of *amici curiae* BellSouth Corporation, *et al.*, in that case discuss and thoroughly refute the same arguments that the PSC makes in this case.

The PSC has taken full advantage of the opportunity to administer the federal regime, not only arbitrating and approving initial agreements, but also resolving interpretive disputes. It claims here, however, that its administrative determinations — at least those involving the interpretation or enforcement of interconnection agreements — are subject only to state court review.

But even if the Court decides, in No. 00-878, that § 252(e)(6) does not authorize federal judicial review of decisions interpreting and enforcing interconnection agreements, it by no means follows that the federal courts are without subject matter jurisdiction. Because 1996 Act interconnection agreements are instruments of federal regulation, and because the PSC's interpretation of such an agreement is an exercise of federal regulatory authority, actions seeking judicial review of such interpretive decisions arise under federal law and therefore properly invoke the district court's general federal-question jurisdiction under § 1331.

When a state commission interprets and applies the requirements of the 1996 Act in the course of arbitrating and approving an agreement — that is, when it decides whether an agreement "meet[s] the requirements" of §§ 251 and 252 (47 U.S.C. § 252(e)(2)(B)) — the statute both expressly permits federal court review (*id.* § 252(e)(6)) and expressly *prohibits* state court review (*id.* § 252(e)(4)). But identical legal issues may arise when a state commission interprets and enforces an agreement that has already been approved. That is most apparent where a dispute arises over the meaning of a requirement that the state commission imposed during arbitration. In that circumstance, the requirements of the 1996 Act and the obligations set forth in the parties' interconnection agreement are not "different sides of the same coin — they are the same side of

the same coin." *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, 527 U.S. 666, 683 (1999).

When a state commission interprets an interconnection agreement in such circumstances, it performs the precise function that Congress determined should be subject to exclusive federal review: elaboration of the substantive statutory obligations imposed by the 1996 Act. It is difficult to imagine why Congress, having provided for *exclusive* federal court review of initial approval determinations, would have *prohibited* federal court review when the same function is performed after approval. If that were its intention, one would expect to see a provision mirroring the preclusive language of § 252(e)(4). *See* Verizon Br. 32-34; U.S. Br. 21-22.

That is no less true in the case of agreements reached through negotiation rather than arbitration. When a state commission interprets a negotiated agreement, it likewise performs a function that is equivalent to the arbitration and approval function under § 252. As an initial matter, parties often adopt provisions through mutual agreement that precisely track the requirements of federal law (as, indeed, the parties did here). *See AT&T Communications of Southern States, Inc. v. BellSouth Telecomms., Inc.*, 229 F.3d 457, 465 (4th Cir. 2000) ("many so-called 'negotiated' provisions represent nothing more than an attempt to comply with the requirements of the 1996 Act"). In that circumstance, again, interpretation of an agreement *is* an elaboration of the 1996 Act's requirements.

But even when a state commission interprets a negotiated agreement containing terms that do not track the precise requirements of §§ 251 and 252, its decision still amounts to an elaboration of obligations imposed by the 1996 Act. That is so because an interconnection agreement reached through negotiation is

not a voluntary, private commercial contract, and its enforcement is not a matter of ordinary contract law. Section 251(c)(1) requires incumbent LECs to enter into interconnection agreements upon a competing carrier's request. Such agreements "fulfill" the duties prescribed ~~in~~ § 251(b) and (c). 47 U.S.C. § 251(c)(1). Those provisions impose on incumbent LECs extraordinary obligations to provide affirmative assistance to their competitors, forcing incumbent LECs, for example, to surrender their network equipment at prices set by regulators at cost (*id.* §§ 251(c)(3), 252(d)(1)); to accommodate the equipment of competitors on their private property (*id.* § 251(c)(6)); and to make services available for resale at a discount determined by regulators (*id.* § 251(c)(4)). Incumbent LECs must do all of this whether or not it promotes their business interests — indeed, despite the fact that such assistance to competitors may well ultimately undermine their business interests.

To be sure, the specific terms of interconnection agreements may be worked out by the parties in negotiation. *Id.* § 252(a)(1). But that is a detail: the duty to enter into such arrangements in the first place, and the baseline requirements on which competitors may insist, are indisputably imposed by the 1996 Act. Interconnection agreements are therefore instruments of coercive federal power; they do not reflect the parties' mutual assent to enter into a binding exchange of promises. *Cf.* Restatement (Second) of Contracts §§ 17, 71 (1981). Accordingly, when a state commission interprets a term reached through negotiation, and dictates the obligations to which the parties are subject, the state commission has elaborated requirements imposed by federal law no less than in those cases where the determination is directly governed by the provisions of the 1996 Act itself. The state commission, in

either case, "participat[es] in the administration of the new *federal* regime." *AT&T*, 525 U.S. at 378 n.6.

Such determinations differ sharply from private-law adjudication in other ways as well. As an initial matter, the 1996 Act *requires* incumbent LECs to provide service in accordance with the terms of interconnection agreements. *See, e.g.*, 47 U.S.C. § 251(c)(3). Unlike parties to a private commercial contract, the parties to an approved interconnection agreement may not simply agree not to abide by the terms of their agreement.

If there were any doubt that interpretation and enforcement decisions have federal regulatory consequences, § 252(i) resolves it. That provision requires incumbent LECs to make "any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 U.S.C. § 252(i). *See AT&T*, 525 U.S. at 395-96. By operation of § 252(i), any obligation undertaken through negotiation becomes a public-law duty that extends to all telecommunications carriers, equivalent to the obligations imposed under § 251(b) and (c). Accordingly, when a state commission interprets and enforces an interconnection agreement, including the negotiated terms in such an agreement, its decision is not merely an exercise in private contract interpretation; it also determines the scope of the incumbent LEC's federal statutory obligations under § 252(i).[2]

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[2] *Amicus* State of Illinois completely ignores the significance of § 252(i) in its fanciful account of "real world cost-benefit analysis employed in contracting." Illinois Br. 14. Because of § 252(i), an incumbent LEC cannot make concessions to one competitor without providing the same concessions to every other competitor that requests them. *See* Verizon Br. 4 ("an incumbent cannot safely engage in ordinary 'give-and-take'") (citing *AT&T*, 525 U.S. at 395). Likewise, a competing carrier need not make any concessions in negotiating an agreement, because it can always simply avail itself of its opt-in right under § 252(i) to pick and choose the best available terms implementing the requirements of § 251(c).

Congress adopted § 252(i) because it recognized that the federal statutory obligations take concrete form through interconnection agreements, arbitrated *and* negotiated. For precisely that reason, all state commission decisions determining the scope of obligations imposed through interconnection agreements — whether reached before or after approval — must be subject to the same federal court review.

II. FEDERAL COURTS HAVE JURISDICTION UNDER § 1331 TO REVIEW DECISIONS MADE BY STATE OFFICIALS EXERCISING FEDERAL STATUTORY AUTHORITY

A. The PSC's lead argument is that Verizon lacks a private right of action under the 1996 Act. PSC Br. 11-25. But that argument conflates the district court's subject matter jurisdiction with the merits of Verizon's claims. As this Court recently reiterated, "[i]t is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998). "Rather, the district court has jurisdiction if 'the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another.'" *Id.* (quoting *Bell v. Hood*, 327 U.S. 678, 685 (1946)). Here, Verizon seeks to enjoin enforcement of a PSC order on the ground that it violates federal law. There can be no serious doubt — whatever the cause of action — that Verizon's right to relief therefore depends on the proper construction of governing federal law.

In any event, the PSC misconceives the nature of Verizon's claims. As the PSC itself recognizes, Verizon's suit was an action for "federal court review of an order" of the PSC. PSC Br. 2. Verizon seeks review to ensure that a *regulator* has acted in conformity with the requirements of the very federal statute that the regulator is administering. In that circumstance, a *federal* right to judicial review is presumed, and such review is a basic component of federal courts' jurisdiction under § 1331. *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 56 (1993); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 494 (1991). No "private right of action" is required to secure such review, and the inquiry described in *Cort v. Ash*, 422 U.S. 66 (1975), is inapposite.

The First Circuit, in an opinion by then-Judge Breyer, explained this pivotal distinction in *NAACP v. Secretary of HUD*, 817 F.2d 149 (1st Cir. 1987). The plaintiff there argued that it had a "private right of action" to enforce obligations that a federal statute (Title VIII of the Civil Rights Act of 1968) imposed on the federal agency administering the statute. *Id.* at 152. After noting that no private right of action was available under Title VIII, the court observed that the "private right of action" inquiry did not fit the situation where a private party seeks review of federal agency action, because such "federal action is nearly always reviewable for conformity with statutory obligations." *Id. See also Cousins v. Secretary of United States Dep't of Transp.*, 880 F.2d 603, 606 (1st Cir. 1989) (en banc) (Breyer, J.).

A private right of action is needed in the quite different situation where a private individual seeks a remedy for an injury inflicted by actions that allegedly violate federal law but are not an exercise of federal administrative authority. *See NAACP*, 817 F.2d at 152. To be sure, such actions may be taken by a state

or other non-federal government actor. For example, in *California v. Sierra Club*, 451 U.S. 287 (1981), the Court considered whether a private individual could sue to enforce the Rivers and Harbors Appropriation Act of 1899, which prohibits the "creation of any obstruction" in the navigable waters of the United States. 33 U.S.C. § 403. Relying on the 1899 Act, the plaintiff sought to enjoin the defendants — including the State of California — from operating or constructing water diversion facilities. In that situation — where state action allegedly ran afoul of a distinct federal statute (but was not an exercise of federal regulatory power) — a private plaintiff may proceed only if the statute provides a private right of action "to enforce the federal statute directly against the non-federal person." *NAACP*, 817 F.2d at 152.

What distinguishes this case from *Sierra Club* is that the agency here, though created by state law, was in fact exercising federal regulatory authority, having elected to "participat[e] in the administration of the new *federal* regime." *AT&T*, 525 U.S. at 378 n.6. As the Seventh Circuit aptly put it, a state commission acts as a "deputized" federal regulator and "regulat[es] on behalf of Congress" when it enforces a 1996 Act interconnection agreement. *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 343, 344 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 896 (2001). The PSC was therefore a federal, not a non-federal, actor, in the jurisdictionally relevant sense. Had the PSC not exercised the authority conferred by Congress — had it declined to "carry out its responsibility" under § 252 — the Federal Communications Commission ("FCC") would have interpreted and enforced the interconnection agreement in its stead. *See* 47 U.S.C. § 252(e)(5).[3]

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[3] That is precisely what happened when the Virginia State Corporation Commission declined to exercise its authority under § 252 to "interpret and enforce" an interconnection agreement. *See* Memorandum

In that event, even if judicial review were not expressly authorized by the Hobbs Act, there can be no doubt that judicial review would be available in federal court under § 1331. *See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) ("judicial review of a final agency action . . . will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress").

The result should be no different here, because the regulatory regime is no less "federal" in nature even when it is "administered by 50 independent state agencies." *AT&T*, 525 U.S. at 378 n.6; *see also* PSC Br. 18 ("primary responsibility for overseeing the implementation of §§ 251 and 252 remains with State administrative agencies"). Verizon is no less subject to an exertion of federal administrative authority when that authority is wielded by the PSC rather than the FCC. Because Verizon's claim is that the PSC's decision constitutes "the exertion of unauthorized administrative power" under a *federal* statute, its claims fall within the jurisdiction of federal courts. *Stark v. Wickard*, 321 U.S. 288, 310 (1944).

For this reason, the burden is on the PSC to identify "'clear and convincing evidence'" of Congress's intent to "restrict access" to federal judicial review. *Abbott Labs.*, 387 U.S. at 141; Verizon Br. 30-35. The PSC ignores this standard, and instead argues that, because Congress affirmatively authorized review under § 252(e)(6), its failure to do so in cases involving a state commission's interpretation or enforcement of an interconnection agreement (assumed for the purposes of this case) implies an intention to foreclose federal

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Opinion and Order, *Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 15 FCC Rcd 11277, 11280, ¶ 7 (2000).

court review. PSC Br. 16. But that argument is inconsistent with this Court's prior holding that "[t]he mere fact that some acts are made reviewable *should not suffice to support an implication of exclusion as to others*." *Abbott Labs.*, 387 U.S. at 141 (emphasis added; internal quotation marks omitted); *see also Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 675 (1986). In the absence of *affirmative* evidence of intent to foreclose review — and the PSC does not and cannot offer any — this Court should conclude that Congress intended all state commission actions taken in the exercise of federal authority under the 1996 Act to be subject to federal judicial review. That conclusion flows naturally from the Court's recognition in *AT&T* that "if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." 525 U.S. at 378 n.6.[4]

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[4] Even if, as the PSC suggests, Verizon's cause of action were created by Maryland's statutory judicial review provision (*see* Md. Code Ann., Pub. Util. Cos. § 3-202 (1998)), the district court would still have jurisdiction over such a claim because Verizon's "'right to relief under state law requires resolution of a substantial question of federal law.'" *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 164 (1997) (quoting *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13 (1983)).

Amicus Illinois — but not the PSC — argues that, insofar as Verizon's cause of action rests on Maryland's statutory judicial review provision, this suit does not qualify as a "civil action" within the meaning of § 1331. Illinois Br. 24-29. But Illinois's principal authority for that proposition is the very Seventh Circuit decision that this Court reversed in *City of Chicago*. As this Court stated in rejecting the same argument there, an action for judicial review of an agency adjudication — for example, an administrative condemnation proceeding — "is 'in its nature a civil action and subject to removal by the defendant to the United States District Court.'" *City of Chicago*, 522 U.S. at 170 (quoting *Chicago, R.I. & P.R.R. v. Stude*, 346 U.S. 574, 578-79 (1954)). "[D]istrict courts routinely conduct deferential review pursuant to their original jurisdiction over federal questions, including on-the-record review of federal administrative action." *Id.* at 171. Under Maryland law, moreover, actions for review of administrative decisions are defined as civil actions.

B. Regardless of the source of Verizon's cause of action, its claims arise under federal law and are within the district court's § 1331 jurisdiction. As we explained in our opening brief, that is true for at least three reasons; the PSC's counter-arguments are unavailing.

First, § 252(a)(1) specifically provides that interconnection agreements are "binding." Verizon's claim that the PSC has imposed obligations inconsistent with the terms of its "binding" agreements therefore alleges a direct violation of Verizon's federal statutory right. Verizon Br. 17-20.[5] Such a claim, "which turn[s] exclusively on federal law, unquestionably fits" within the district court's original jurisdiction. *City of Chicago*, 522 U.S. at 164. The PSC simply ignores this argument. *Amicus* Illinois claims that the position is "odd" because Verizon "has maintained that the disputed reciprocal compensation provisions at issue in this case" track the requirements of federal law. Illinois Br. 11 n.1. That response is a non-sequitur. Verizon's position here is that the parties, pursuant to § 252(a)(1), negotiated an agreement that tracks the

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See Md. Code Ann., Pub. Util. Cos. § 3-206(b)(2) (1998) (providing that proceedings for judicial review shall be given precedence "over all *other* civil actions") (emphasis added). It is of course irrelevant that Maryland law designates state court as the proper venue for such an action; Maryland cannot deprive federal courts of jurisdiction granted by Congress under § 1331. *See Railway Co. v. Whitton's Adm'r*, 80 U.S. (13 Wall.) 270, 286 (1872); *Begay v. Kerr-McGee Corp.*, 682 F.2d 1311, 1315 (9th Cir. 1982).

[5] Section 252(a)(1) may not plausibly be dismissed as intended simply to permit agreements that stray from the 1996 Act's duties. *See* PSC Br. 22; Illinois Br. 11-13. Congress could have accomplished *that* objective without including the term "binding." Its inclusion must therefore be understood to have independent significance. *See, e.g., TRW Inc. v. Andrews*, No. 00-1045, slip op. at 10-11 (U.S. Nov. 13, 2001) (applying "cardinal principle" that a statute should be construed, if possible, so that "no clause, sentence, or word shall be superfluous, void, or insignificant") (internal quotation marks omitted).

requirements of federal law. The PSC imposed obligations on Verizon that are inconsistent both with federal law *and* (for that reason) with the parties' agreement. It is the *latter* inconsistency that is relevant for purposes of Verizon's claim of violation of its federal right to a "binding" agreement under § 252(a)(1).

Second, the underlying obligations at issue in this case — which form the substantive basis of Verizon's claim — are federal in nature because the interconnection agreement is a federal contract. Verizon Br. 20-25. The PSC, joined by WorldCom, disputes this point, arguing that interconnection agreements are simply state-law contracts the interpretation and enforcement of which raise only issues of state law to be resolved by state courts. PSC Br. 20-21; WorldCom Br. 19-20. Both rely on *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15 (1982), in which this Court held that employment contracts between local governments and their employees, though required by federal law as a condition of receiving certain federal financial assistance, were controlled by state law, and that a suit to enforce such a contract therefore presented only state-law claims. What both the PSC and WorldCom overlook is that the Court rested its decision on a determination, informed by the particular statute's text and legislative history, that Congress "intended those contracts to be governed by state law applied in state courts." *Id.* at 29. *See* Verizon Br. 24-25. Had Congress not made its intentions so clearly known, the contracts would have been deemed "creatures of federal law," and the suit at issue would have stated federal claims. *Jackson Transit*, 457 U.S. at 23.

Congress exhibited no such intention in the 1996 Act, and this case is therefore controlled by *International Association of Machinists v. Central Airlines, Inc.*, 372 U.S. 682 (1963). *See* Verizon Br. 21-24. Because

interconnection agreements are Congress's chosen instrument for implementing the substantive duties contained in §§ 251 and 252, "their validity, interpretation, and enforceability" are matters of federal law. 372 U.S. at 691. WorldCom simply ignores *Central Airlines*, and the PSC, while purporting to distinguish the case, offers no principled basis for doing so. *See* PSC Br. 24.

Third, it is beyond dispute that, if interconnection agreements are properly considered tantamount to federal tariffs, their construction raises a federal question. *See Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533 (1983); Verizon Br. 25-29. The PSC admits, as it must, that interconnection agreements "are analogous to tariffs," but it argues that they should be considered *state* tariffs, not federal tariffs. PSC Br. 22-23. That argument is untenable, most obviously because the underlying obligations that the interconnection agreements "fulfill" (*see* 47 U.S.C. § 251(c)(1)) — the requirements of §§ 251 and 252 — are imposed by federal, not state, law. Moreover, the characteristics that give interconnection agreements their tariff-like character — that they must include "a detailed schedule of itemized charges" (*id.* § 252(a)(1)), that they must be filed and made available for public inspection (*id.* § 252(h)), that the incumbent LEC must provide service in accordance with their terms (*id.* § 251(c)(2)(D), (c)(3)), and, perhaps most important, that their provisions must be made available to all other carriers on the same terms and conditions (*id.* § 252(i)) — all reflect requirements of federal law, not state law. The PSC does not and cannot explain why the mere fact that federal law requires such agree-

C. WorldCom's claim that the district court had jurisdiction under § 1331 but that it does not have jurisdiction to decide the substance of the issues presented is incorrect and internally inconsistent. As Verizon has always made clear, its claim for relief in this case rests on the allegation that the PSC grossly misinterpreted the parties' governing interconnection agreement and thereby materially altered its terms. The district court's jurisdiction must stand or fall on whether such a claim raises a substantial federal question. WorldCom's strategy of arguing *both* that "interpretation of th[e] contract" does not raise "a federal question" (WorldCom Br. 20) *and* that Verizon's case belonged in federal court in the first instance is legally indefensible.[6]

Contrary to WorldCom's argument, Verizon's claims here depend exclusively on rights and obligations created under federal law. The suggestion that interconnection agreements are more state-law contracts ignores the reality that Verizon does not execute such interconnection agreements voluntarily but is required to submit to the coercive effect of such agreements in order to fulfill its statutory obligations under the 1996 Act. *See* Verizon Br. 20-21. The legal effect of such interconnection agreements is dictated by federal, not state, law — indeed, even if state law *barred* such

[6] Such a strategy is evidently designed simply to create the greatest possible obstacle to effective judicial review of erroneous state commission decisions — like the ones at issue in this case and in No. 00-878 —

agreements between competitors, they would remain "binding" by operation of *federal* law. *Id.* at 20-29.[7]

Just as important, WorldCom's view leads to an "incoherent jurisdictional scheme." *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 275 (1996). Under WorldCom's view, a plaintiff would have to bring suit in federal court first to determine whether a state commission's interpretive decision violates federal law — a claim that must presumably rest on some basis other than an error in interpreting an agreement's terms. Only after the federal court has ruled (and appeal rights have been exhausted) may a plaintiff pursue a claim in state court based on the state commission's supposed violation of state-law rights under the interconnection agreement. As the Seventh Circuit put it, "every time a carrier complains about a state agency's action concerning an agreement, it must start in federal court . . . and then may move to state court." No. 00-878 Pet. App. 5a. It is inconceivable that Congress would have created so inefficient a scheme.

Indeed, the Court in *Bank One* rejected an interpretation of the Expedited Funds Availability Act that strikingly resembles WorldCom's proposed interpretation of the 1996 Act. The Seventh Circuit had read the statute to require a bifurcated jurisdictional scheme in which certain types of claims "would be adjudicated in

[7] If WorldCom were right and interconnection agreements were state-law contracts, then the PSC had no jurisdiction over the parties' dispute in the first place. The PSC has jurisdiction only over claims that "allege a violation" of the state statute. Md. Code Ann., Pub. Util. Cos. § 3-102(a)(2) (1998). Nothing in Maryland law gives the PSC jurisdiction over common-law claims of breach of contract. Indeed, the implication of WorldCom's argument is that state commissions would generally have no role in interpreting or enforcing agreements once they have been approved under § 252(e). This is a position that not only WorldCom itself (and every other party to this case) but also every court to consider this issue has correctly rejected.

one forum" while other claims arising out of the same transaction "would originate in another." *Bank One*, 516 U.S. at 275. "And [other] claims under state law would presumably have to be raised in a separate state-court proceeding." *Id.* The Court refused to accept the Seventh Circuit's vision of fractured jurisdiction. "Even if the text of [the statute] could plausibly be read to create this decidedly inefficient jurisdictional scheme, we would hesitate to attribute such a design to Congress." *Id.* at 275-76.

The Court should show the same hesitancy here. Because interconnection agreements are inherently federal in nature, and because state commission decisions interpreting and enforcing those agreements are exercises of federal authority that Congress has entrusted to the state regulatory agencies, such decisions, in their entirety, are properly subject to unified federal court review.

III. THE *ROOKER-FELDMAN* DOCTRINE IS INAPPLICABLE TO DECISIONS OF ADMINISTRATIVE AGENCIES

The PSC's argument that this Court's *Rooker-Feldman* doctrine bars review here misconceives the substance of this Court's precedents. Perhaps most fundamentally, the principles of *Rooker-Feldman* do not apply here because the PSC acted pursuant to authority conferred by federal law, not state law. As the PSC notes, both the state and federal governments have the power "to transfer some adjudicatory functions to administrative agencies, with opportunity for subsequent judicial review." *Printz v. United States*, 521 U.S. 898, 929 n.14 (1997). Here, the PSC's authority to interpret and enforce interconnection agreements was granted by Congress, not by the State of Maryland. Verizon Br. 37-39. Accordingly, even if *Rooker-Feldman* were applicable to administrative

adjudications conducted under the authority of state law (and it is not), the doctrine would not apply here.

Even the dissenters in *City of Chicago* — who were otherwise skeptical about federal court review of state agency action — acknowledged the importance of this distinction. As Justice Ginsburg stated, the notion that federal courts may review state administrative action undertaken pursuant to a federal statute (in that case, the Individuals with Disabilities Education Act ("IDEA")) is unremarkable. "IDEA creates a *federal* regime. While IDEA may require federal courts to defer to state agency decisions, those decisions are made pursuant to *federal* legislation." *City of Chicago*, 522 U.S. at 180 n.4 (Ginsburg, J., dissenting). The same reasoning applies here and explains why federal court review is completely natural: the PSC's order too was issued in the exercise of authority conferred by federal legislation — the 1996 Act.

In any event, *City of Chicago* makes clear that the *Rooker-Feldman* doctrine does not apply to decisions of state agencies — even when those agencies act pursuant to a *state* administrative scheme. *See City of Chicago*, 522 U.S. at 169 ("federal jurisdiction generally encompasses judicial review of state administrative decisions"); Verizon Br. 35-37. The PSC argues that *City of Chicago* is distinguishable because there the district court's jurisdiction over claims involving on-the-record review of a state administrative order rested on 28 U.S.C. § 1367, the supplemental jurisdiction statute. PSC Br. 46-47. But that is no distinction at all for present purposes: the *Rooker-Feldman* doctrine interprets 28 U.S.C. § 1257(a) — which gives this Court jurisdiction to review judgments of a state's highest court — to foreclose such review by lower federal courts. The supplemental jurisdiction statute

provides no exception to that rule.[8] That the Court permitted on-the-record review of a state administrative adjudication in *City of Chicago* (despite a prominent reference to *Rooker* in the dissent, *see* 522 U.S. at 176-77 (Ginsburg, J., dissenting)) establishes that the limitation on jurisdiction embodied in the *Rooker-Feldman* doctrine is simply inapplicable in cases challenging decisions of state administrative agencies, as opposed to decisions of state courts. The doctrine thus poses no bar to review here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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November 26, 2001

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[8] *See, e.g., Fielder v. Credit Acceptance Corp.*, 188 F.3d 1031, 1039 (8th Cir. 1999); *In re Lutheran Brotherhood Variable Ins. Prods. Co. Sales Practices Litig.*, 105 F. Supp. 2d 1037, 1043 (D. Minn. 2000).

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Nos. 00-1531 and 00-1711

IN THE
Supreme Court of the United States

VERIZON MARYLAND INC.,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,

On Writs of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

BRIEF *AMICUS CURIAE OF THE VIRGINIA STATE CORPORATION COMMISSION*

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IN THE
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UNITED STATES OF AMERICA,
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On Writs of Certiorari
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For The Fourth Circuit

BRIEF *AMICUS CURIAE*

The interest of the Commission in this proceeding is that of a State agency that, pursuant to State constitutional authority and legislation, has the authority to regulate the telecommunications industry in the Commonwealth of Virginia. The Commission's views are not adequately represented by petitioners, respondents or other parties. It is believed that the views contained herein will provide a more complete view of the Constitutional and statutory issues involved.

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QUESTION PRESENTED IN NOS. 00-1531 & 00-1711

Whether a federal district court has subject-matter jurisdiction under 28 U.S.C. § 1331 to determine whether a state public utility commission's order interpreting or enforcing an interconnection agreement violates the Telecommunications Act of 1996?

STATEMENT OF *AMICUS* INTEREST[1]

The Virginia State Corporation Commission is a State administrative body created by the Constitution of

[1] Rule 37.6 Statement: William H. Chambliss, General Counsel to the Virginia State Corporation Commission, is the author of this brief. No person or entity other than the Virginia State Corporation Commission has made a monetary contribution to the preparation or submission of this brief.

Virginia and charged with, among other things, the regulation of telecommunications entities within the Commonwealth of Virginia. Va. Const., Art. IX Sec. 1, *et seq.* The Va. Commission continues to be involved in the regulation of telecommunications entities and the creation of competitive markets for the benefit of Virginia consumers. The Constitution of Virginia and Virginia state law confer upon the Commission the authority under state law to order interconnection between carriers operating within the Commonwealth and specifically § 56-38, et seq. of the Code of Virginia authorizes the Commission, upon request of the parties, "to effect, by mediation, the adjustment of claims, and the settlement of controversies, between public service companies, and their employees and patrons." After the passage of the 1996 Act, the Va. Commission became involved in the arbitration and interpretation of interconnection agreements between competitive local exchange companies ("CLECs"), seeking to enter the local telephone market in Virginia and incumbent local exchange companies ("ILECs").

In *GTE South Inc. v. Morrison*, 6 F. Supp. 2d 517 (E.D. Va. 1998), aff'd 199 F.3d 733 (4th Cir. 1999), the Court held that the Commission in arbitrating interconnection agreements pursuant to § 252 of the 1996 Act, waived any claims of sovereign immunity under the Eleventh Amendment. Subsequently, the Va. Commission has declined to waive sovereign immunity under the Eleventh Amendment of the United States because it has not been empowered by either the Constitution of Virginia or the Code of Virginia to do so.[2] Consequently, the Va.

[2] *Petition of Starpower Communications, LLC, For declaratory judgment and enforcement of interconnection agreement with Bell Atlantic-Virginia, Inc.*, Case No. PUC990156, 2000 S.C.C. Ann. Rep. 272; *Petition of Starpower Communications, LLC, For declaratory judgment interpreting interconnection agreement with GTE South, Inc.*, Case No. PUC990023; and *Petition of Cox Virginia Telecom, Inc. v. GTE*

Commission is no longer able to enforce § 252 of the Act for arbitration since doing so imperils Virginia's sovereign immunity. Nor does the Va. Commission approve negotiated interconnection agreements under the 1996 Act, but instead relies on state law authority.[3] The Virginia State Corporation Commission offers to conduct arbitration of interconnection agreements pursuant only to existing state law authority.[4] At this time all telecommunications entities offered this option by the Va. Commission have declined said offer, and the Federal Communications Commission is presently arbitrating a Virginia case.[5]

As the success of the opening of competitive markets in the telecommunications industry is dependent upon a well-functioning framework of interdependent regulatory entities and the appropriate recognition to the decisions and

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South Incorporated, For enforcement of interconnection agreement for reciprocal compensation for the termination of local calls to Internet Service Providers, Case No. PUC990046, 2000 S.C.C. Ann. Rep. 263.

[3] Therefore, the Virginia State Corporation Commission awaits this Court's decision on the issue of a state commission's waiver of sovereign immunity by participation in actions pursuant to § 252 of the 1996 Act. It is reasonably believed that other state regulatory bodies are similarly positioned, i.e., without express authority to waive the immunity of their particular state.

[4] Virginia SCC Rules codified at 20 VAC 5-400-180 as "Rules governing the offering of competitive local exchange telephone service" provide for the authority to address interconnection issues under the authority of the Virginia Code. Rules 20 VAC 5-400-180 F 5 and 6 specifically provide for arbitration of contested issues.

[5] *In the matter of Petition of AT&T Communications of Virginia, Inc., For preemption of jurisdiction of the Virginia State Corporation Commission pursuant to § 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 00-251, DA 01-198, 2001 WL 62694 (F.C.C. January 26, 2001).

authority of the State commissions, the Commission urges this Court to sustain the orders below. The Court of Appeals decision that no waiver of sovereign immunity occurred by State commission participation in the regulation of interconnection agreements is in accord with law and Congressional intent. The Virginia State Corporation Commission supports the position that State commissions must retain the authority to render final orders or decisions which possess full effect and finality under state law. The Court should conclude that neither the 1996 Act nor § 1331 provide a basis for a finding of waiver of sovereign immunity by a state commission fulfilling obligations imposed by the 1996 Act.

SUMMARY OF ARGUMENT

In 1996, Congress enacted the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 251 et seq.) to open the local telecommunications markets to competition.[6] The 1996 Act[7]

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[6] At the time the 1996 Act was passed, 19 states had in place rules opening the local exchange market to competition. In seven states, competing firms already had begun to offer switched local service. These states were California, Illinois, Maryland, Massachusetts, Michigan, New York, and Washington. Competition rules were in place in Arizona, Colorado, Connecticut, Florida, Georgia, Iowa, Louisiana, North Carolina, Ohio, Oregon, Tennessee, and Virginia. See, *Common Carrier Competition Report*, CC Report No. 96-9, FCC, Common Carrier Bureau 1996 WL 164625 (F.C.C. April 10, 1996) at page 3. Particularly, the Virginia General Assembly amended § 56-265.4:4 of the Code of Virginia to provide for competition in local exchange telecommunications in 1995. The Va. Commission enacted rules governing the provision of such services; codified at 20 VAC 5-400-180 as "Rules governing the offering of competitive local exchange telephone service".

[7] *See*, 47 U.S.C. §§ 251-261. The 1996 Act is codified throughout Title 47 of the United States Code. References to the 1996 Act are to the relevant sections of the Code.

imposes a general duty on all telecommunications carriers to interconnect with other telecommunications carriers. 47 U.S.C. § 251(a). With regard to ILECs, the duty to interconnect is even more specifically defined by § 251(c)(2). (Cite to this assertion)

In conjunction with these interconnection obligations, the 1996 Act requires all local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of telecommunications. 47 U.S.C. § 251(b)(5). For purposes of compliance with this subsection, the 1996 Act provides that such terms and conditions must provide for the recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carriers. Further, such terms and conditions must determine costs on the basis of a reasonable approximation of the additional costs of terminating such calls. 47 U.S.C. § 252(d)(2)(A). However, ILECs may negotiate and enter in a binding agreement with a requesting carrier without regard to the standards set forth in subsections (b) and (c) of § 251.

As a State that has been in the forefront of the development and opening of competitive markets in the telecommunications industry,[8] the Commonwealth of Virginia has an important stake in the protection of the framework and relationship between the telecommunications industry, the State commissions, and Federal courts created under the 1996 Act. Virginia likewise has an equally important stake in maintaining sovereignty over the processes of its state judicial and regulatory bodies. The federal district courts have only that jurisdiction that Congress grants through statute. The federal district courts do not possess subject-matter jurisdiction over suits that

[8] As of June, 2001, 200 competitive local exchange companies (CLECs) have certificated in the Commonwealth of Virginia.

challenge, as contrary to federal laws, orders of state public utility commissions interpreting or enforcing interconnection agreements. Congress has not abrogated the State commission's sovereign immunity pursuant to 28 U.S.C. § 1331.

ARGUMENT

I. Federal Courts Do Not Have General Federal Question Jurisdiction To Determine Whether State Commission Determinations Violate the 1996 Act Under § 1331.

The Fourth Circuit held that 28 U.S.C. § 1331 does not provide federal jurisdiction because Congress intended federal jurisdiction to be limited to the grant in 47 U.S.C. § 252(e)(6).[9] Furthermore, the Court of Appeals held that "the simple fact that interconnection agreements are "creations of federal law" does not make their interpretation a sufficiently substantial federal question to confer jurisdiction under 28 U.S.C. § 1331."[10] Petitioners contend that the federal district courts have jurisdiction under 28 U.S.C. § 1331.[11] The Va Commission maintains that the case before this Court does not meet the requirements for jurisdiction under 28 U.S.C. § 1331.[12]

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[9] Bell Atlantic Maryland, Inc. v. MCI WorldCom Inc., *et al.*, 240 F.3d 279, 309 (4th Cir. 2001).

[10] Id.. at 308.

[11] Section 1331 provides in pertinent part, that "[t]he district courts shall have original jurisdiction of all civil actions arising under the. . .laws. . .of the United States.

[12] The party seeking the federal forum must establish the basis for the court's jurisdiction. Petitioners have failed to allege that the federal law creates any cause of action. Jurisdiction may not be sustained on a theory that the plaintiff does not advance. *Healy v. Seagull Specialty Co.*, 237 U.S. 479, 480 (1915).

The federal district courts have that jurisdiction which Congress grants through statute. Because federal question jurisdiction ultimately depends on an act of Congress, the scope of the district courts' jurisdiction depends on the Congressional intent manifested in the statute at issue.

Furthermore, § 1331 jurisdiction may be preempted by a doctrine which requires jurisdiction to reside elsewhere. Congress has not abrogated the State commission's sovereign immunity pursuant to § 1331. The Supreme Court has expressly held that § 1331 does not suffice to abrogate immunity for all federal questions. *Blatchford v. Noatak,* 501 U.S. 775, 786 (1991). In light of this statement, no reasonable argument could be made that § 1331 constitutes an abrogation of state immunity.

A. There is no private cause of action under the 1996 Act

Even though Congress has conferred general federal question jurisdiction on the federal district courts under 28 U.S.C. § 1331 in terms similar to the constitutional provision, the term "arising under" in the statute is narrower than the similarly defined constitutional power. *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 495 (1983). Because federal question jurisdiction ultimately depends on an act of Congress, the scope of the district courts' jurisdiction depends on the Congressional intent manifested in the statute at issue. As this Court has held, "the source of plaintiff's rights must be found. . .in the substantive provisions of the. . .Act which they seek to enforce. . .*Touche Ross & Co. v. Reddington,* 442 U.S. 560, 577 (1979).

Section 1331 should be construed strictly and all doubts should be resolved in favor of State court jurisdiction. *Aetna Inc. Co. v. Chicago RI & PR Co.*, 229 F.2d 584, 586

(10th Cir. 1956). There are two tests under which an action may present a federal question. The first asks whether federal law creates the cause of action. If so, federal question jurisdiction exits. *American Well Works Co. v. Layne & Bowber Co.*, 241 U.S. 257, 260 (1916). If state law creates the cause of action, the second test asks whether that cause of action poses a substantial federal questions. *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 201 (1921).[13]

Courts begin with the presumption that if a statute does not expressly create a private cause of action, one does not exist. *See, Louisiana Landmarks Soc. Inc. v. City of New Orleans,* 85 F.3d 1119, 1123 (5th Cir 1996). By now, Congress is well aware of this presumption and how to craft statutes that unequivocally do provide private remedies. *See, Touche Ross & Co. v. Redington,* 442 U.S. 560, 572 (1979) ("*Touche*"). Appellants argument relies upon the erroneous assumption that the existence of a federal statute automatically gives rise to § 1331 jurisdiction.[14]

Under the settled framework for evaluating whether a private cause of action may be inferred from a statute, the factors considered include whether the plaintiff is part of the class for whose special benefit the statute was passed; and whether the indicia of legislative intent reveals a congressional purpose to provide a private cause of action or deny one; whether it is consistent with the underlying legislative scheme to imply such a remedy; and whether the

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[13] Since no state law claims are raised, this second test does not apply.

[14] Petitioners contend in this appeal that if Congress had intended to restrict the jurisdiction of the federal district courts, it would have expressly precluded jurisdiction in the 1996 Act. This argument is obviated by the fact that federal district courts are courts of limited jurisdiction and only possess that jurisdiction granted expressly by Congress.

cause of action is one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law. *Cort v. Ash*, 422 U.S. 66, 78 (1975) ("*Cort*").

Unless Congressional intent to create a private cause of action can be inferred from the language of the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist. *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 94 (1981). Whether Congress has created an enforceable right is determined by its intent. *Smith v. Kirk*, 821 F.2d 980, 982 (4th Cir. 1987). Neither the language of the 1996 Act nor its legislative history indicates that Congress intended to create a private cause of action.

The legislative history of the 1996 Act establishes that telecommunications entities were not intended to be special beneficiaries of the statute enacted. The Act itself expresses Congress' intent "to promote competition and reduce regulation in order to secure lower prices and higher quality services for ***American telecommunications consumers*** and encourage the rapid deployment of new telecommunications technologies." Telecommunications Act of 1996, Pub. L. No. 104-104, purpose statement, 110 Stat. 56, 56 (1996). (Emphasis added) In its report concerning the legislation, Congress specifically stated that:

> . . . in order to secure lower prices and higher quality services for **American telecommunications consumers** . . . The result will be lower prices to **consumers and businesses,** . . . a competitive edge for **American businesses**, . . . Indeed, the enormous **benefits to American businesses and consumers** from lifting the shackles of monopoly regulation . . .

H.R. Rep. No. 204, 104th Cong., 2nd Sess. 4748, *reprinted in* U.S.C.C.A.N. (March 1996) (emphasis added). Thus, it is clear that the 1996 Act was enacted to benefit consumers generally and was not intended to specially benefit ILECs such as BA-MD.

Furthermore, an examination of the legislative history and statutory scheme presents no indication that Congress intended to create a general private cause of action. No language in the Act supports such an argument. There are limited express grants of federal jurisdiction in the 1996 Act[15] but, as pertinent here, one such grant is limited[16] to suits brought by parties to interconnection agreements. 47 U.S.C. § 252(e)(6). Under § 252(e)(6), a district court's review of a State Commission's approval or rejection of an interconnection agreement is limited to whether the agreement meets the requirements of §§ 251 and 252. Such review is narrowly construed and does not cover other aspects of a State Commission's decision, such as consistency with State law, or matters covered in § 253. *See, Southwestern Bell Telephone,* 225 F.3d 942. Therefore, § 252(e)(6) is a limited jurisdictional provision.

Aside from the narrow remedy contained in § 252(e)(6), the 1996 Act also explicitly provides for federal

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[15] Section 252(e)(6) provides, in pertinent part, in any case in which a State Commission makes a determination under this section, any party injured by such decision may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of Section 251.

[16] The district courts have construed § 252(e)(6) narrowly. *See, e.g. Citizen's Utility Ratepayers Board v. McKee,* 946 F. Supp. 89 (D. Kan. 1996) (Plaintiff is not an aggrieved party under § 252(e)(6); only the interconnecting service provider or affected local exchange carriers has standing.)

court jurisdiction in two other sections. Section 274 creates federal jurisdiction in the electronic publishing area and Section 207 creates the same jurisdiction over interstate communications disputes. That Congress expressly provided for a specific right of access to the federal courts in § 252(e)(6) and the other sections noted above is evidence that when Congress wished to provide a private remedy, it knew how to do so and did so expressly. *Touche*, 442 U.S. at 572.

The conclusion that Congress did not intend to create a private cause of action is further supported by the fact that Congress considered but failed to include a private right of action in the 1996 Act for violations of an interconnection agreement. Section 257 of the Senate Bill expressly provided for a general private right of action. S. Rep. No. 23, 104th Cong., 1st Sess., 1995 at 104-05 (March 30, 1995). However, this provision was not enacted in the final legislation. Congress' express grant of federal rights of action in the three sections of the 1996 Act while deleting a general provision from the Senate Bill, demonstrates that Congress did not intend to create an implied cause of action.

Consideration of the first two *Cort* factors is dispositive. The language of the statute and its legislative history do not suggest that the Act was intended to create federal rights for the benefit of a class of persons but rather was intended to benefit the public at large through a regulatory scheme to be administered in large part by the States. *See, California v. Sierra Club*, 451 U.S. 287, 298 (1981). Nor is there any evidence that Congress anticipated that there would be a private remedy.

This being the case, it is unnecessary to inquire further to determine whether the purpose of the statute would be advanced by the judicial implication of a private action or whether such a remedy is within the federal domain of

interest. These factors are only of relevance if the first two factors give indication of Congressional intent to create the remedy. *Id., citing, Touche,* 442 U.S. at 574-576.

The conclusion that the 1996 Act does not create a private cause of action negates any claim of federal subject matter jurisdiction.[17] In the absence of a federal statutory cause of action, declaratory relief by a federal court is available only when a federal statute totally precludes State regulation of the matter being litigated. In other words, the federal statute must have entirely occupied the field, preventing any state regulation of matters within the scope of the federal statute. *Western Airlines, Inc. v. Port Authority of New York and New Jersey*, 817 F.2d 222, 225-26 (2nd Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). See, also *Burgio and Campofelice, Inc. v. NYS Dept. of Labor*, 107 F.3d 1000, 1007 (2d Cir. 1997). A preemption cause of action for declaratory relief is not an alternative means for enforcing the substantive provisions of the federal statute. *Western Air Lines v. Port Authority of New York & New Jersey*, 817 F.2d at 225-26.

No reasonable argument could be made contending that the 1996 Act entirely preempts state regulation of local exchange service or local exchange carriers. Among a variety of other things, § 252 requires a state commission to determine wholesale rates in the context of an arbitration. *See, e.g.*, §§ 251(c)(4) and (6); 251(d)(3); 251(f), 252, 253(b) and (f), 254 and 261(c).

This Court should find that the 1996 Act does not create a private cause of action, nor does it "occupy the field," thereby preventing any state regulation of matters

[17] This Court held that the Federal Communications Act of 1934 "does not create new private rights". *See Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U.S. 4, 14 (1942).

falling within the scope of the federal statute. Given these conclusions, the Court should hold that the district court did not have jurisdiction pursuant to 28 U.S.C. § 1331 and therefore uphold the decision of the Court of Appeals.

II. The *Rooker-Feldman* Doctrine Was Properly Applied By the Fourth Circuit.

The *Rooker-Feldman* doctrine stems from two Supreme Court cases decided sixty years apart. In *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), the Supreme Court held that lower federal courts lack jurisdiction to entertain appeals from state court judgments because that power is reserved to the Supreme Court. In 1983, the Supreme Court decided *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), clarifying *Rooker* and giving the *Rooker-Feldman* doctrine its name. In *Feldman*, the Supreme Court held that lower federal courts have no jurisdiction to hear "challenges to state court decisions in particular cases arising out of judicial proceedings", *Id.* at 486, or decide questions "inextricably intertwined" with State court judgments. *Id.* at 483 n. 16.

The *Rooker-Feldman* doctrine is founded on two main inferences derived from provisions of Title 28 of the United States Code. The first inference is that 28 U.S.C. § 1257, which gives the Supreme Court appellate review of certain State court decisions, is the only federal statute that explicitly provides for federal review of state court decisions. Congress granted original jurisdiction to federal district courts under a variety of statutes, including 28 U.S.C. §§ 1331 and 1332. Under this statutory scheme, federal district courts are courts of original, not appellate jurisdiction. Thus, by inference, 28 U.S.C. § 1257 granted jurisdiction exclusively to the Supreme Court to review final judgments or decrees from the highest court in a state. The

second inference is that Congress intended to foreclose all other forms of federal court review of state decisions. Because Congress only gave the Supreme Court the explicit authority to review the decisions of a state court, Congress meant to deny all other federal courts that power.

Thus, the *Rooker-Feldman* doctrine is an extension of the principle that federal courts are courts of limited jurisdiction. Also underlying the *Rooker-Feldman* doctrine is the idea of federalism. The doctrine is designed to preserve the two distinct legal systems so that each may proceed independently of the other with the Supreme Court as the final arbiter of any federal questions raised in either system. The policy reasons that underlie the doctrine apply just as readily to state agency decisions rendered in quasi-judicial proceedings as they do to State court decisions.

The *Feldman* Court found that the federal district court was "without authority to review final determinations of the [D.C. Court] in judicial proceedings. Review of such determinations can be obtained only in this Court. *See*, 28 U.S.C. § 1257." *Feldman*, 460 U.S. at 476. In reaching this conclusion, the Supreme Court analyzed the crucial question whether the proceedings before the D.C. Court "were judicial in nature" so as to bring these proceedings under the ambit of *Rooker*.

The leading case relied upon by the *Feldman* Court was *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908), where the Supreme Court acknowledge that your *amici*, the Virginia State Corporation Commission, is at least for some purposes, a court. 211 U.S. at 224. *Prentis* also held that:

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist .... Legislation on the other hand looks

> to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.

211 U.S. at 226. The *Feldman* Court agreed with the *Prentis* finding that the question regarding whether a proceeding is judicial in nature "depends not upon the character of the body but upon the character of the proceedings." 460 U.S. at 477. The *Feldman* Court found that the proceedings at issue were judicial in nature because the tribunal "was called upon to **investigate, declare and enforce** liabilities as they stood on present or past facts and under laws supposed already to exist." *Feldman*, 460 U.S. at 479. Consequently, the *Feldman* Court ruled that the district court lacked subject matter jurisdiction over applicants' claims for individual relief.

The Va. Commission has the powers of a court of record to administer oaths, compel the attendance of witnesses and production of documents, punish for contempt, and enforce compliance with its orders through fines and other penalties as prescribed or authorized by law.[18] This Court has recognized that state agencies perform judicial acts in *FERC v. Mississippi*, 456 U.S. 742, 760-61 (1982). The *Rooker-Feldman* doctrine preserves the autonomy of both sovereigns and prevents undue incursions of federal courts upon lower courts. The Fourth Circuit recognized the judicial nature of state commissions' proceedings and properly found that federalism requires the federal district courts to refrain from taking jurisdiction in cases involving state commissions.

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[18] Code of Virginia § 12.1-13.

CONCLUSION

The judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

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IN THE

Supreme Court of the United States

VERIZON MARYLAND, INC.,

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, *et al.*,

Respondents.

UNITED STATES OF AMERICA

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, *et al*

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE STATE OF ILLINOIS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE

The State of Illinois has a strong interest in the manner in which the regulation of local telephone service is conducted, both generally and in this case. The members of the Illinois Commerce Commission, the agency of the state of Illinois that is charged with the task of public utility regulation, are the Petitioners in the case to be argued in tandem with the instant case, *Mathias v. WorldCom Technologies, Inc.*, No. 00-878. The question presented in this case involves an alternative argument for federal district court jurisdiction to review state commission decisions to that put forth by the Respondents in *Mathias* based on 47 U.S.C. § 252(e)(6). The commissioners, and therefore the State of Illinois, seek to assist in persuading this Court not to find such jurisdiction by that alternate route in this case.

Aside from that specific interest, the State of Illinois, through the Illinois Commerce Commission, has been an active regulator of local telephone service for decades. It has long sought to regulate that form of commerce in accordance with state law and in harmony with federal laws and regulations. The State of Illinois believes that the Telecommunications Act of 1996 sets forth an allocation of responsibilities between federal and state institutions that, while no doubt different from that which preceded it, continues to maintain a balance between state and federal interests. The State of Illinois believes that the 1996 Act was designed to continue federal respect for state sovereignty, and is strongly interested in ensuring that 28 U.S.C. § 1331 is construed in a way th :t promotes that legislative design.

SUMMARY OF THE ARGUMENT

In this case, Petitioner Verizon seeks federal district court review of an order by the Maryland Public Service Commission, a state agency. Neither § 252(e)(6) of the Telecommunications Act of 1996 nor 28 U.S.C. § 1331, the general federal question statute, confers subject matter jurisdiction on federal district courts to hear appeals from state commission orders interpreting or enforcing interconnection agreements. In fact, Verizon's appeal is a routine appeal of the Maryland commission's order that is reviewed exclusively by Maryland courts.

Under Article III, Congress has sole responsibility for determining the jurisdiction of the lower federal courts. Congress also determines when private parties are to be given causes of action under legislation it adopts. When Congress intends not to create a private right of action, federal court must respect that decision and not assume the legislative function of creating one, lest they risk enlarging their jurisdiction. The Federal Judiciary, as one of three co-equal branches of the Federal Government, must be vigilant to ensure against such encroachment, which reflects a consideration for separation of powers principles. And when the Federal Judiciary is called upon to determine whether Congress intended to create a private right of action against the States, that request also implicates substantial federalism principles and the Court must be especially attentive to the States' status as sovereigns. Here, Petitioners ask the Court to relax its vigilance and find a private right of action where none exists. In fact, Petitioners argue not only for a private cause of action under the Telecommunications Act of 1996, where Congress intended none, but also for a private right of action against the States. Neither argument is well-founded.

1. Sections 251 and 252 of the 1996 Act do not create private rights of action. Section 251 imposes obligations on incumbent local telephone exchange carriers such as Petitioner Verizon to new entrants such as MCI WorldCom. Those obligations may be implemented through interconnection agreements reached under § 252's negotiation and arbitration procedures or reached without regard to the standards set forth in § 251. Either way, federal law creates the duty to enter into agreements and allocates to the contracting parties, in the first instance, the responsibility to negotiate the terms and conditions of their agreements. Leaving the details of the agreement to the contracting parties, Congress intended that traditional state law contract principles would govern their relationship, and, correspondingly, that state law would provide the remedy for violation of the agreement. As a consequence, the 1996 Act does not create private rights of action for breaches of those agreements.

And, more particularly, §§ 251 and 252 do not create private rights of action against *state commissions* for review of their orders interpreting or enforcing agreements. Congress carefully tailored a limited federal remedial scheme that permits federal review of state commission determinations involving the approval or rejection of an agreement, and even then the review is limited to determining whether the agreement meets the requirements of §§ 251 and 252. *See* 47 U.S.C. § 252(e)(6). In carefully tailoring review under § 252(e)(6) to apply only to state commission determinations approving or rejecting agreements, Congress intended to preclude alternative means of federal review. The review under § 252(e)(6) does not include federal district court review of state commission orders deciding disputes over the meaning of the terms in those agreements. Rather, Congress left supervision of the performance of the agreements to the

States, adjudication of disputes to state commissions, and subsequent judicial review to state courts. To allow carriers to obtain review of state commission decisions interpreting or enforcing agreements under § 1331, when Congress intended for those decisions to be reviewed by state courts, would cast aside the statutory scheme and render superfluous the limited statutory review provided under § 252(e)(6).

2. Besides the lack of private rights of action under §§ 251 and 252, Verizon's complaint seeks appellate review of the Maryland commission's order that is not within a federal district court's original jurisdiction under § 1331. Although Verizon styles its action as a complaint for declaratory relief, it merely seeks review and correction of the Maryland commission's order. "Federal courts have no general appellate authority over state courts or state agencies." *Hameetman v. City of Chicago*, 776 F.2d 636, 640 (7th Cir. 1985). The claims Verizon considers to be federal claims were raised, litigated, and decided at the Maryland commission. Verizon alleges no federal claims separate and distinct from defenses it raised and the Maryland commission decided. Therefore, its claims are bound by the administrative record before the Maryland commission and, accordingly, its complaint for review is not with a federal district court's original jurisdiction.

In addition, Verizon's complaint seeking judicial review of the Maryland commission's order is not a "civil action" within the meaning of § 1331. Maryland courts exercise a special statutory jurisdiction that provides for a deferential review of the Maryland commission's findings and conclusions. As a consequence, Verizon's complaint for review is one for appellate review of the Maryland commission's order and not a "civil action" as required by § 1331. The review Verizon seeks here is a continuation of the administrative

proceedings before the Maryland Commission and, therefore, does not come within § 1331.

ARGUMENT

Under the federal Constitution, "federal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 (1981).

> Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute. Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.

Alexander v. Sandoval, 532 U.S. 275, __, 121 S. Ct. 1511, 1519-20 (2001) (internal citations and quotation marks omitted). It is to be presumed that a cause lies outside this limited jurisdiction, and the burden rests upon the party asserting jurisdiction to establish the contrary. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

I. THE 1996 ACT DOES NOT CREATE A PRIVATE RIGHT OF ACTION AGAINST STATE COMMISSIONS FOR REVIEW OF THEIR DECISIONS INTERPRETING AND ENFORCING INTERCONNECTION AGREEMENTS.

The briefs filed by Petitioners in this case begin their analysis of the question presented in the middle. Petitioners assume that federal law creates a private right of action for breach of interconnection agreements, and then proceed to argue in favor of jurisdiction in the federal courts to review decisions of state commissions considering such claims. Because federal law creates no such right, the Court need not consider whether the federal district courts have jurisdiction under 28 U.S.C. § 1331 to afford Petitioners a remedy for its violation.

Sections 251 and 252 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.) ("1996 Act") do not create independent, private rights of action upon which to base federal court subject matter jurisdiction. Section 251 establishes *obligations* of incumbent local exchange carriers ("LECs") such as Verizon to new entrants such as MCI WorldCom, and those *obligations* may be implemented through interconnection agreements reached under § 252's negotiation and arbitration procedures. Or, an incumbent LEC and a new entrant may negotiate and enter into an agreement without regard to the standards in §§ 251(b) and (c). In either case, "[t]he Act clearly does not set out specific conditions which one party could enforce against the other. The details are left to the parties, or the commissions, to work out." *Illinois Bell Tel. Co. v. WorldCom Tech., Inc.*, 179 F.3d 566, 573 (7th Cir. 1999), *amended*, 1999 U.S. App. LEXIS 20635 (Aug. 19, 1999), *cert. granted sub nom.*

Mathias v. WorldCom Tech., 121 S. Ct. 1224 (2000). Thus, federal law creates the duty to enter into agreements, and Congress left it to the contracting parties, in the first instance, to settle on the particular terms and conditions of their agreement.

Congress, however, did not create a federal private right of action for breach of agreements in the 1996 Act. Leaving the details of agreements to the parties, Congress intended that traditional state law contract principles govern their ensuing relationships. Quite naturally, Congress intended that state law would provide the remedy for violation of the agreements. The right of carriers to seek redress for violations regarding the performance of their agreements arises under state law. Simply put, the 1996 Act does not create a private right of action for injuries resulting from the parties' performance under their agreements.

Likewise, and particularly relevant here, nothing in the 1996 Act gives private parties a direct cause of action against state commissions for review of their orders regarding the performance of agreements. As explained more fully in the Brief of Petitioners in *Mathias v. WorldCom Technologies, Inc.*, No 00-878, at pp. 16-26, Congress in the 1996 Act carefully crafted a limited federal remedial scheme for review of state commission determinations made under § 252—that is, state commission determinations involving the formation of agreements. A state commission acts "under section 252" when a carrier i) requests mediation (§ 252(a)(2)), ii) petitions for arbitration (§ 252(b)(1)), or iii) submits an agreement for approval (§ 252(e)(1)). The provisions of § 252 are quite specific in their application and do not address obligations of the parties or of the state commissions that go beyond those listed in that section in connection with interconnection agreements. Indeed, even insofar as it pro-

vides for district court review of state commission decisions regarding the formation of agreements, § 252(e)(6) provides for determinations limited to whether the agreement at issue "meets the requirements of" §§ 251 and 252.

The language, structure and purpose of the 1996 Act therefore make unmistakably clear that Congress considered the issue and did not intend to create a private right of action for federal review of state commission decisions interpreting or enforcing agreements. In carefully tailoring review under § 252(e)(6) to apply only to state commission determinations approving or rejecting agreements, Congress intended to preclude alternative means of federal review. As the Fourth Circuit cogently explained below, "[i]t would be nonsensical to conclude that even though Congress carefully articulated jurisdictional responsibility in the 1996 Act, it nonetheless intended to have 28 U.S.C. § 1331 override this effort." Pet. App. 48a. Thus, exercising federal question jurisdiction under § 1331 to allow federal review of state commission orders adjudicating disputes over the performance of agreements would represent an impermissible end-run around that limited framework.

Nor can a private right of action be implied under the 1996 Act. The central inquiry where rights of action may be implied remains whether Congress intended to create a private right of action. The Court in *Cort v. Ash*, 422 U.S. 66 (1975), has prescribed the relevant inquiry:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff one of the class for whose especial benefit the statute was enacted- that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78 (citations and internal quotation marks omitted).

Nowhere in the text of § 251 or § 252, or in their legislative history is there an indication that Congress intended to create a private right of action for violations of their provisions, let alone one that permitted federal review of state commission orders interpreting or enforcing agreements. First, the 1996 Act was enacted for the benefit of consumers and not telephone service providers. Congress described the purpose of the Act as follows: "An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56, 56 (purpose statement). Nonetheless, Congress sought to accomplish this purpose in the 1996 Act by regulating the conduct of those providers. "Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'" *Alexander,* 532 U.S. at __, 121 S. Ct. at 1521 *(quoting California v. Sierra Club*, 451 U.S. 287, 294 (1981)). The 1996 Act regulates telecommunications carriers, with emphasis on LECs and particular emphasis on incumbent LECs such as Verizon, with the goal of further opening local telephone markets to competition, for the ulti-

mate benefit of local telephone users. *See* § 251(b) (establishing obligations on LECs); *id.* § 251(c) (establishing additional obligations on incumbent LECs). Thus, the 1996 Act, in particular the statutes at issue here, was enacted for the benefit of consumers, not for the benefit of LECs, especially incumbent LECs such as Verizon.

Second, as explained above, nowhere in the text of the 1996 Act does Congress create a private right of action for the claims alleged here. In addition, the legislative history reveals that Congress considered, but decided against, creating private rights of action for violations of 47 U.S.C. § 251. S. Rep. No. 652, 104th Cong., 1st Sess. 46-47, 104-05 (1995) (discussing § 224 of the Senate bill adding proposed § 257 to 47 U.S.C.). Proposed § 257 created private rights of action for violations of § 251 (which in that bill also included much of what now is 47 U.S.C. § 252), including an action based on the failure of a carrier to comply with the terms of an approved agreement, that would have been enforceable by carriers in the federal district courts. Proposed § 257(c) made those rights enforceable by injured persons through civil actions in federal districts courts. Before the 1996 Act was enacted, however, Congress deleted proposed § 257 and added § 252(e)(6) instead. Congress' action in deleting proposed § 257 and adding § 252(e)(6) is compelling evidence that Congress did not intend to create private rights of action in the 1996 Act.

The Court has indicated that where the first two factors are resolved in the negative, it is unnecessary to consider the remaining factors and the inquiry is at an end. *Touche Ross & Co. v. Redington*, 442 U.S. 577, 575-76 (1979); *id.* at 579-80 (Brennan, J., concurring). Thus, the Court need go no further in this case. Because Congress created no private right of action in favor of carriers either to enforce the obligations

in § 251 against each other in federal court or for federal review of state commission decisions interpreting or enforcing agreements, the issue of whether 28 U.S.C. §1331 provides for jurisdiction to enforce that non-existent right is a moot point.

Notwithstanding, Petitioner Verizon advances two arguments in support of its contention that jurisdiction exists under § 1331, neither of which has merit. (Neither Petitioners MCI nor the United States joins Verizon in making these arguments.). First, Verizon contends that it has a federal statutory right to enter into a "binding" agreement under § 252(a)(1).[1] Verizon Br. at 17. On the contrary, the 1996 Act imposes a duty on Verizon to negotiate and enter into agreements upon request. § 251(c)(1); § 252(f)(5) (duty to negotiate an agreement not affected by submitting statement of generally available terms). Although § 252(a)(1) allows an incumbent LEC to enter into an agreement without regard to the substantive standards in §§ 251(b) and (c), it does not alter the fact that a duty nonetheless exists to enter into an agreement, nor does it somehow transform that duty into a right. An agreement entered into with regard to the Act or one whose terms are imposed in arbitration is no less binding on the parties than an agreement entered into without regard to the 1996 Act. Verizon may not shirk its duty merely by claiming the duty is a right. Unlike a right, Verizon may not unilaterally waive or relinquish its obligations under the

[1] It is odd that Verizon claims a violation of § 252(a)(1) when it consistently has maintained that the disputed reciprocal compensation provisions at issue in this case were negotiated *with regard* to the Act. *See* Verizon Br. at 19 (contending that that the reciprocal compensation provisions in its agreement reflect an "express incorporation of the federal statutory standard.").

1996 Act. Moreover, as explained above, Verizon is not in the class for whose special benefit the statute was enacted. The 1996 Act was enacted to benefit telephone customers, not Verizon. Accordingly, Verizon has no federal statutory right under 252(a)(1) and its contention is without merit.[2]

The gravamen of Verizon's second contention is that the agreements are federal contracts, and any claim based on those contracts arises under federal law. Verizon Br. at 20-25. Although the 1996 Act imposes a duty on incumbent LECs to enter into agreements upon request, it does not impose specific obligations that contracting parties can enforce against each other independent of the terms and conditions of the agreement. Congress intended to encourage private negotiation of agreements and established minimum standards incumbent LECs must agree to provide if sought by a requesting carrier. But the actual details are left to the contracting parties. Section 252(a)(1) specifically allows carriers to enter into agreements without regard to the substantive standards in §§ 251(b) and (c). If Congress had in-

[2] Verizon further contends (and assumes a federal right of action) that the construction of federal statutory language incorporated into an agreement presents a federal question. Verizon Br. at 19-20. The Court rejected a similar argument in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 813 (1986), holding that merely because a tribunal must interpret federal law or federal regulations to determine the merits of a state cause of action is insufficient to confer federal question jurisdiction. Here of course, Congress intended for violations of agreements to be brought under state law. There is no private right of action for violation of § 251 or § 252 other than a right stemming from the agreement. Verizon sought a declaratory ruling from the MPSC regarding its agreement, the MPSC interpreted the agreement, and review of that decision must be had in the state courts of Maryland.

tended to impose and enforce federal standards, it could have simply mandated detailed federal standards, rather than allowed the parties to negotiate privately terms and conditions in particular agreements with or without regard to those standards.

Even the mandatory incorporation of federal standards into a contract (which, of course is not the case here) does not, in and of itself, create federal jurisdiction in a contract action based on an alleged violation of those standards. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 814 (1986); *Jackson Transit Auth.v. Local Div.* 1285, *Amalgamated Transit Union*, 457 U.S. 15, 29 (1982). The touchstone is congressional intent and, here, Congress intended that the agreements be governed by state law. Indeed, as implemented, the agreements themselves specifically provide that they are governed by state law, and disputes about the meaning of their terms and conditions arise under state law. As the Fourth Circuit explained:

> It is a question of State law, however, whether the interconnection agreement at issue in this case includes a dynamic incorporation of statutory interpretation, including the definition of which calls constitute local calls subject to reciprocal compensation.....The State commission construed the agreement at issue in this case in accordance with its conclusions about the parties' intent on the issue of how to classify ISP-bound calls.

Pet. App. 27a.

There is absolutely no support in the text and structure of the 1996 Act for the notion that Congress intended to carve out

and "federalize" a special category of state contract law involving telecommunications.[3]

Verizon's argument relies on the undefended premise that agreements are not truly voluntarily negotiated, but reflect merely federal regulatory obligations. In Verizon's view, interconnection agreements will almost always mirror the requirements of the 1996 Act because incumbent LECs will give no more than the Act requires, and competing LECs will accept no less. Verizon Br. at 3-5. This idea, however, ignores the real world cost-benefit analysis employed in contracting. Contracting parties commonly forego those items or terms to which they believe they may be entitled or may be able to obtain in negotiation in exchange for other items or terms they perceive to be more valuable. These exchanges and concessions are the essence of negotiation, and are permissible under the Act. It is certainly conceivable that, among other things, the carriers weighed the expected costs to secure an item (here, the costs of compulsory arbitration and possible further litigation in the courts) and the probability of actually receiving a favorable decision against the expected value of the item. Clearly, the benefit of obtaining a particular item to which one is entitled (or retaining

[3] Moreover, agreements contain many provisions, *e.g.*, dispute resolution, indemnification, limitation of liability, that are not federal obligations. Further, § 252(e)(3) expressly allows state commissions to "establish[ ] or enforce[ ] *other* requirements of State law" in their review of agreements submitted for approval under § 252(e)(1). 47 U.S.C. § 252 (e)(3) (emphasis added). Hence, that section presumes agreements would be governed by state law even before state commissions begin their review. As a consequence, Verizon's argument that *any* claim based on an agreement arises under federal law most surely is incorrect.

an item one is not required to give up) may be substantially outweighed by the costs of actually securing it (or retaining it).

In addition, incentives likely exist for both competing LECs and incumbent LECs to voluntarily enter agreements that do not necessarily "mirror" the requirements of the 1996 Act. For example, competing LECs may have an incentive to take less than what they are entitled to not only to lower costs, but also to gain the ability to enter the local market more quickly and begin providing service in competition with the incumbent. Indeed, in Illinois, shortly after passage of the 1996 Act, three of the carriers who are parties in *Mathias,* Teleport Communications Group, Inc., Focal Communications Corp. and MFS Intelenet of Illinois (predecessor to MCI WorldCom) executed privately negotiated agreements with Ameritech Illinois and promptly began providing service under them.

To be sure, incumbent LECs may be motivated to protect their monopolies, but Congress recognized this and provided the statutory framework to redress the disparity in bargaining strength. Besides the prospect of compulsory arbitration, Congress provided an additional, more powerful incentive for incumbent LECs to cooperate and open their markets to competition: entry into the in-region long distance market. Verizon, as an incumbent LEC, may have a strong incentive to give more than the minimum requirements of the 1996 Act in order to persuade regulators that it has opened its local market to competition and, therefore, win approval to enter the long-distance market under § 271 of the 1996 Act. Verizon, along with the other Regional Bell Operating Companies, have been clamoring to gain entry to the lucrative long distance market, and it is this "carrot- and-stick" approach to opening telecommunications markets that the 1996 Act

adopts. 47 U.S.C. § 153(4); *see BellSouth Corp. v. FCC*, 144 F.3d 58, 60-61 (D.C. Cir. 1998); *SBC Communications Inc. v. FCC*, 138 F.3d 410 (D.C. Cir. 1998).

Verizon also equates agreements with federal tariffs, going so far as to assert that "1996 Act interconnection agreements function in all material respects as federal tariffs." Verizon Br. at 26. Significantly, however, Verizon does not assert that the services in agreements are *actually* set forth in federal tariffs filed with the FCC. They are not. The agreements are for the provision of local telephone service. The rates, terms and conditions of local services incumbent LECs offer, including those required by § 251, are, to the extent required, set forth in state tariffs filed with state commissions, not in federal tariffs filed with the FCC. *See* 47 U.S.C. § 203 (requiring tariffs filed with the FCC for *interstate* services); *id.* § 152(b) (preserving state authority over intrastate services). In Illinois, for example, the interconnection, unbundled network element and resale service obligations of § 251 that incumbent Ameritech Illinois provides in its interconnection agreements are also set forth in state tariffs filed and administered by the Illinois Commerce Commission ("ICC"). Illinois Bell Telephone Company Tariff No. 20, Part 19 (setting forth the terms and conditions for unbundled network elements) (available at http://www.sbc.com/PublicAffairs/PublicPolicy/Tariffs2/1,3950,281,00.html?pid=260); *see, e.g.*, Michigan Bell Telephone Co., Tariff No. 20, Part 19 (available at http://www.sbc.com/PublicAffairs/PublicPolicy/Tariffs2/1,3950,281,00.html?pid=282); *see generally* SBC tariffs (available at http://www.sbc.com/PublicAffairs/PublicPolicy/Tariffs2/1,3950,281,00.html).

Other provisions of the 1996 Act demonstrate that interconnection agreements are not federal tariffs. Section 252(h) requires that approved agreements be filed with state commissions, not the FCC. Furthermore, § 252(f)(1) permits Bell operating companies such as Verizon to file statements of generally available terms ("SGAT") setting forth the terms and conditions offered to comply with its obligations under § 251. Under § 252(f), those SGATs are also filed with state commissions, not the FCC. *See, e.g.*, Bell Atlantic SGAT filed in Maryland (available at http://www.bellatlantic.com/tariffs_info/intra/efftar/md/sgat/index.htm). To be sure, suits to enforce tariffs filed with the FCC have been held to arise under federal law. *E.g.*, *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488 (7th Cir. 1998). By parity of reasoning, suits to enforce agreements, which are filed with state commissions, and whose services are also set forth in state tariffs, arise under state law.

Petitioner MCI's reliance on *Jackson Transit* in support of its contention that the district court had jurisdiction under § 1331 to hear Verizon's complaint against the Maryland Public Service Commission ("MPSC") is misplaced. MCI Br. at 21-22. Under § 13(c) of the Urban Mass Transportation Act of 1964, state and local governments were required to make arrangements to preserve transit workers' existing collective bargaining rights as a condition for receipt of federal funds before acquiring a privately-owned transit company. *Jackson Transit*, 457 U.S. at 16. Jackson Transit Authority entered into a § 13(c) agreement guaranteeing the existence of its workers' bargaining rights and a collective bargaining contract with the union. *Id.* at 18-19. Unlike in *Jackson Transit*, where the existence of a federal right was not disputed, Verizon claims a federal right where none exists. Section 251 imposes obligations on Verizon; it does not be-

stow rights, and certainly none that can be enforced against state commissions that apply here. Cf. § 252(e)(6) (providing for judicial review of state commission determinations made in the approval process). Furthermore, the local government entity in *Jackson Transit* was a party to the § 13(c) contract. 457 U.S. at 19. Here, of course, the MPSC is not a party to the agreement; instead, it was the state adjudicator of the parties' dispute over the meaning of the agreement. The 1996 Act does not give Verizon, or LECs (incumbents and new entrants) in general, a federal right to a particular outcome in disputes between themselves over agreements that is enforceable against state commissions in federal court.

II. FEDERAL DISTRICT COURTS LACK JURISDICTION UNDER 28 U.S.C. § 1331 TO REVIEW STATE COMMISSION ORDERS INTERPRETING OR ENFORCING INTERCONNECTION AGREEMENTS.

Even if the Court were to accept Petitioners' view of the 1996 Act and find a private right of action, the most weight that construction could bear is that the parties to an agreement could bring an action against each other in federal court, not against state commissions for review of their orders. Section 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States." 28 U.S.C. § 1331. Subject matter jurisdiction under § 1331 does not exist because Verizon's appeal of the MPSC's order 1) is not within a federal district court's "original jurisdiction," and 2) is not a "civil action" as required by § 1331. The review Verizon seeks here is a continuation of the administrative proceedings before the MPSC. As a result, it does not come within § 1331.

A. Verizon's Appeal Is Not Within a Federal District Court's Original Jurisdiction.

A federal issue raised, litigated and decided before a state administrative agency (or for that matter a state court) does not qualify as a federal question within a district court's *original jurisdiction* under § 1331 merely by restating that federal issue in a complaint filed in federal court. Verizon raised and fully litigated at the MPSC the allegations contained in its complaint. In turn, the MPSC considered and rejected Verizon's arguments on the merits. Verizon does not argue that it has alleged in its complaint a federal or constitutional claim different from those federal issues it raised at the MPSC. It merely seeks appellate review of state and federal issues decided by the MPSC and correction of the MPSC's order.

The nub of Petitioners' argument is that, since Verizon has alleged claims "arising under the Constitution, laws or treaties of the United States," it has met the requirements of §1331. Verizon Br. at 11, 16, United States Br. at 17-18; MCI Br. at 16-18. Their undefended premise is that the mere allegation of a federal question without regard to whether that federal question was previously litigated in and decided by a state agency establishes jurisdiction under § 1331. This premise is erroneous. Verizon impermissibly seeks to bootstrap federal defenses raised, fully litigated, and rejected at the MPSC into federal questions within a district court's "original" jurisdiction. However, because it fails to allege a federal question *separate and distinct* from the federal defenses raised and decided at the MPSC, it fails to satisfy the requirements of § 1331. Petitioners ignore the fundamental legal principle that "[f]ederal courts have no general appellate authority over state courts or state agencies." *Hameetman v. City of Chicago*, 776 F.2d 636, 640 (7th Cir. 1985).

More particularly, federal district courts, as courts of original jurisdiction, do not have appellate power, and are without jurisdiction to review on appeal action taken administratively or judicially in a state proceeding. *See Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 354-55 (1961); *Chicago, R.I. & P. Co. v. Stude*, 346 U.S. 574, 581 (1954). Cross-system appellate authority is entrusted solely to this Court, not to the lower federal courts.

In its complaint, Verizon seeks just that: appellate review of the MPSC's order in federal district court. In Count I, Verizon alleges that the MPSC violated federal law by misapplying relevant FCC decisions in interpreting language in Verizon's interconnection agreements. Complt. ¶¶ 5, 39-40. Count II alleges the MPSC violated federal law by misreading the FCC's ruling to require the MPSC to impose reciprocal compensation for ISP-bound calls. *Id.* ¶¶ 6, 41-42. The claims Verizon considers to be federal claims were raised, fully litigated, and rejected by the MPSC. Verizon merely seeks review and correction of the MPSC's order. As a result, its claims are bound by the administrative record before the MPSC. *See City of Chicago v. International College of Surgeons*, 522 U.S. 156, 167-68 (1997) (finding property owners' federal claims not originally brought before the state administrative agency were not bound by the administrative record).

Petitioners, however, contend that *International College of Surgeons* supports jurisdiction to review the MPSC's order. Verizon Br. at 35-38; MCI Br. at 26; United States Br. at 25. However, the critical difference between *International College of Surgeons* and this case is that in the former case, plaintiffs raised their federal claims for the first time in court after the administrative proceedings at the agency had concluded. Respondents International College of Surgeons and

a related organization (collectively "ICS") applied for permits to demolish two buildings on properties it owns in Chicago, which had been designated by city ordinance as historic landmarks. 522 U.S. at 159-60. The Commission on Chicago Historical and Architectural Landmarks ("Landmarks Commission"), to which the application was forwarded, denied those permit requests. *Id.* at 160. ICS then filed a complaint in the Circuit Court for Cook County seeking judicial review of the Landmark Commission's administrative decision to deny the permits. It also raised for the first time in its complaint several federal constitutional challenges. *International College of Surgeons v. City of Chicago*, Nos. 91 C 1587, 91 C 5564 (cons.), 1992 WL 6729, at *2-3 (N.D. Ill. Jan. 10, 1992).

Following the denial of its permit request, ICS filed an application seeking an economic hardship exception to the Landmark Commission's denial of the demolition permits. *Id.* at *2. The Landmark Commission denied ICS' application. ICS then filed a second complaint in the Court for Cook County seeking judicial review of the Landmark Commission's administrative decision to deny the economic exception. *Id.* at *3. It also raised for the first time in its complaint facial and as-applied federal constitutional challenges to Chicago's Landmarks Ordinance. *Id.* Consequently, the district court's original jurisdiction derived from ICS' federal claims, filed for the first time in the circuit court, which were not decided by the Landmarks Commission and, therefore, were not part of the administrative record.

Whether a federal question is within a district court's original jurisdiction turns not on whether evidence outside the administrative record may be considered, but rather on which issues and claims themselves are part of the adminis-

trative record. In this case, all of Verizon's federal claims are part of the administrative record and it alleges no federal question independent of the federal issues decided in the administrative record that would establish federal question jurisdiction under § 1331. Thus, because Verizon's complaint asks this Court to reconsider federal issues already litigated and decided at the MPSC it does not come within the Court's original jurisdiction. *See International College of Surgeons*, 522 U.S. at 167-68.

The cases Petitioners rely on purportedly to establish federal jurisdiction serve only to highlight the differences between this case and federal question cases properly within a district court's "original jurisdiction" under § 1331. For example, in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), several airline companies brought suit in federal district court for a declaratory judgment alleging that New York's Human Rights Law was preempted by the federal Employee Retirement Income Security Act of 1974 (ERISA). *Id.* at 92-93. Similarly, in *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256 (1985), Lawrence County initially brought suit in federal district court for a declaratory judgment that a South Dakota statute conflicted with a federal statute. *Id.* at 259 & n.6. In both cases the federal questions were first brought in the district court and thus were not previously decided by a state court or administrative agency. As a result, the federal claims were properly within the district court's original jurisdiction under § 1331.[4]

[4] Of course, that the suits were merely filed in district court does not determine whether the suit is within the court's original jurisdiction. The suits could have been filed in a state trial court and removed by defendants pursuant to 28 U.S.C. § 1441. The controlling factor is whether the federal questions were previously decided by a state court or administrative agency. If the federal questions were already decided by a state court or agency then the suits are not within the district court's original jurisdiction under § 1331.

In contrast, the claims Verizon asserts to be federal questions were previously litigated and decided at the MPSC. As a consequence, they are not within the district court's "original jurisdiction." Indeed, if the district court were to consider the questions, as Verizon requests, it would necessarily involve the court in reconsidering the MPSC's decisions on the federal issues and, accordingly, require it to conduct an appellate review. However, it is precisely this "appellate" jurisdiction which § 1331 expressly precludes.

A more analogous scenario illustrates the point. If, for example, the airlines in *Shaw* and the county in *Lawrence County* had chosen to file their federal preemption suits initially in state court, litigated the suits in state court and lost, they could not thereafter seek review in federal district court on those same claims under § 1331. The reason is simple: the district court would lack original jurisdiction. The court would be performing an appellate review of the state court's decision, and it is precisely this "appellate" jurisdiction which § 1331 expressly precludes. Further review of the state court's decision on the federal preemption claims would lie only in the state appellate system, with federal review possible only in the U.S. Supreme Court. *Lynx v. La-Porte Superior Court No. 2*, 789 F.2d 554, 563 (7th Cir. 1986). In this case, the MPSC, like the state trial court in the above example, decided all of the issues Verizon alleges in its complaint. The sole means for obtaining review of the MPSC's decision is prescribed by Maryland law, Md. Code

Ann., Pub. Util. Co., § 3-203 (2001), which fixes administrative review exclusively in Maryland state court.[5]

The events in *Mathias* are particularly instructive. After the ICC issued its decision, Ameritech Illinois filed a Petition for Review of the ICC's order in the Illinois Appellate Court. It also filed a complaint for review of the ICC's order in federal district court. It is inconceivable how Ameritech Illinois' appeal can simultaneously constitute an appeal in state appellate court under the Illinois Public Utilities Act, 220 ILCS 5/1-101 *et seq.*, and an action within a federal district court's original jurisdiction under 28 U.S.C. § 1331. Unlike the situation in *International College of Surgeons*, where ICS filed a complaint in circuit court alleging, for the first time, federal claims and seeking judicial review of the Landmark Commission's decisions, Ameritech Illinois filed a petition for review of the ICC's order in state appellate court seeking review of federal and state law questions decided by the ICC, not a complaint in circuit court alleging federal claims different from those issues it raised and litigated before the ICC.

B. Review of the MPSC's Order Is Not A "Civil Action" Under 28 U.S.C. § 1331.

Verizon's action seeking appellate review of the MPSC's order is not a "civil action" within the meaning of § 1331. The Seventh Circuit in *International College of Surgeons v.*

[5] Moreover, that Verizon requests declaratory relief is immaterial. *See Mackay v. Pfeil*, 827 F.2d 540, 545 (9th Cir. 1987) (holding that a request for declaratory relief that does not state a new case arising upon new facts, but in reality seeks review and correction of a state court judgment, is not within a federal court's original jurisdiction).

City of Chicago, 91 F.3d 981 (7th Cir. 1996), *rev'd on other grounds*, 522 U.S. 156 (1997) explained, in the context of a removal action, the test for determining whether an action seeking judicial review of a state administrative agency's decision is a civil action within a district court's original jurisdiction. If the state administrative review process provides for a trial *de novo*, the action does not require the district court to perform an appellate function that is inconsistent with the character of a court of original jurisdiction, and the state proceeding can be termed a "civil action." *Id.* at 990. If, however, the state administrative process requires the state court to proceed on the basis of a more deferential review of the state agency's findings and determinations, the action would require the district court to perform an appellate role with respect to the decision of the state administrative agency. In that case, "[t]he district court would not be performing a function that could be described as a 'civil action' within its original jurisdiction." *Id.* & n.10 (collecting cases). Thus, in analyzing whether an action is a "civil action" within the meaning of § 1331, the relevant inquiry is how the Maryland courts review the MPSC's decisions.

In reviewing the decisions of the MPSC, Maryland courts exercise a statutory jurisdiction. Md. Code Ann., Pub. Util. Co., § 3-203 (2001). Like the Illinois Administrative Review Act ("IARA") at issue in *International College of Surgeons*, § 3-203 of the Maryland Statute restricts the exercise of a reviewing court's power to those functions expressly delegated in the statute. This special statutory jurisdiction provides for a deferential review of the MPSC's findings and determinations. The appeal is to be heard on the record be-

fore the MPSC,[6] the MPSC's findings and conclusions on factual questions shall not be disturbed unless found to be unlawful or unreasonable by clear and satisfactory evidence, and the MPSC's decisions and orders shall be held to be *prima facie* correct. *Id.* § 3-203; *Office of Peoples Counsel v. Maryland Public Service Comm'n*, 733 A.2d 996, 1002-03 (Md. 1999). In short, the scope of review under § 3-203 is similar to that of the IARA in all respects that the Seventh Circuit in *International College of Surgeons* relied on in reaching its decision.[7]

Applying the test it articulated to the IARA, the Seventh Circuit in *International College of Surgeons* found that

[6] Although a party may introduce new evidence on judicial review in the circuit court, that evidence, if materially different, is first referred to the MPSC for opportunity to modify its findings. § 3-208; § 3-206(b). If, on referral, the MPSC rescinds its order, the circuit court shall dismiss the appeal and any modification made by the Commission shall stand in place of the original action. *Id.* § 3-208(c)(1). If, on referral, the MPSC does not rescind or modify the original action, the circuit court shall render judgment on the original order. *Id.* § 3-208(c)(2).

[7] In Illinois, review of ICC decisions starts in the Illinois Appellate Court. In reviewing decisions of the ICC, Illinois appellate courts exercise a statutory jurisdiction, and not a general appellate jurisdiction. This special statutory jurisdiction is found in 220 ILCS § 5/10-201. Like the IARA, § 5/10-201 also restricts the exercise of a reviewing court's power to those functions expressly delegated in the statute. For example, the appeal shall be heard on the record before the ICC and no new or additional evidence may be introduced, the ICC's findings and conclusions on questions of fact shall be held prima facie to be true, and the ICC's decisions and orders shall be held to be *prima facie* reasonable. 220 ILCS § 5/10-201(d).

"[j]udicial scrutiny with this level of deference to the decision of the administrative agency certainly cannot be characterized as within the original jurisdiction of the court....It is an appellate proceeding and, as such, it is not a 'civil action'...of which the district courts...have original jurisdiction." *International College of Surgeons*, 91 F.3d at 992. As in *International College of Surgeons*, Verizon's action is an appellate proceeding and, thus, not a "civil action" within the meaning of § 1331. *See Trapp v Goetz,* 373 F.2d 380, 383 (10th Cir. 1966) ("An appeal from a state administrative board is not a 'civil action' as required by 28 U.S.C. § 1331 or § 1332.").

Petitioner Verizon implies that this Court rejected the Seventh Circuit's test for determining whether a suit is a "civil action" within a district court's original jurisdiction in its consideration of the *International College of Surgeons* case. *See* Verizon Br. at 36-37. In fact, the Court did not disturb the Seventh Circuit's test for determining whether a suit constitutes a "civil action" within a district court's original jurisdiction. Instead, it merely rejected the manner in which the Seventh Circuit applied the test to the particular circumstances before it. The Seventh Circuit held that even though the federal claims were removable, the entire suit was not a removable "civil action" because it contained state administrative claims for deferential on-the-record-review which were not "civil actions" of which the district court's have "original jurisdiction." *International College of Surgeons*, 91 F.3d at 993-94. The Seventh Circuit's error, this Court explained, was not in applying the test for a "civil action" to the federal claims, but rather in applying the test to the state administrative claims after it had already determined that the federal claims were civil actions within the

district court's original jurisdiction. *International College of Surgeons,* 522 U.S. at 166-67. The Court remarked:

> Nothing in the jurisdictional statutes suggests that the presence of related state law claims somehow alters the fact that ICS's federal claims were "civil actions" within the federal courts' "original jurisdiction."
>
> Having thus established federal jurisdiction, the relevant inquiry respecting the accompanying state claims is whether they fall within a district court's supplemental jurisdiction, not its original jurisdiction.

Id. at 166-67. Supplemental jurisdiction lies over related "other claims" if and only if there already exists a "civil action of which the district courts have original jurisdiction." 28 U.S.C. § 1367(a). That is, the exercise of supplemental jurisdiction presupposes a "civil action."

As distinguished from *International College of Surgeons*, in the instant case there is no federal claim independent of the administrative record that constitutes a "civil action" for purposes of § 1331. In other words, no independent federal claim predicate exists for supplemental jurisdiction to attach. Verizon's complaint contains two pendent claims in search of a federal question claim within the meaning of § 1331. In *International College of Surgeons*, ICS' constitutional claims were found to be "civil actions" because they were raised for the first time in the complaint in the circuit court and were not raised and decided at the Landmarks Commission. Since all of the claims in Verizon's complaint were raised, fully litigated, and decided at the MPSC its claims are bound by the administrative record. *International College of Surgeons*,

522 U.S. at 167. As a consequence, Verizon's action is one for appellate review of the MPSC's order and, therefore, is not a "civil action" within the meaning of § 1331.

In sum, because Verizon's action is one for appellate review of an MPSC order its appeal is not within the Court's "original jurisdiction" and is not a "civil action" as required by § 1331. Likewise, because Verizon's appeal arises under Maryland law, it does not "arise under" federal law for purposes of § 1331. If, as Verizon asserts, it finds fault with the MPSC's order, its proper course of action is to seek judicial review in Maryland courts. Verizon may not, as it does here, engage in an impermissible collateral attack of the MPSC's order in federal court. Accordingly, 28 U.S.C. § 1331 provides no basis for jurisdiction over Verizon's appeal.

CONCLUSION

The decision of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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